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1986

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Publication Information

12 William Mitchell Law Review 223 (1986)

Repository Citation

Prince, J. David, "Legislative Oversight of Administrative Agencies in Minnesota" (1986). *Faculty Scholarship*. Paper 135.
<http://open.mitchellhamline.edu/facsch/135>

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Legislative Oversight of Administrative Agencies in Minnesota

Abstract

Due to the expanding role of agencies within the Executive branch at both the state and federal level, legislatures are struggling to fulfill their obligation to hold agencies accountable and to modify legislative mandates when necessary. In order for the legislature to fulfill this obligation, it must have the capability to exercise policy formation and oversight goals. This Article will first examine the need for legislative oversight and the legislative oversight mechanism in Minnesota. Next, the Article discusses the legislative controls currently being used at the federal and state level. Executive control mechanisms and their possible use by a legislature will then be examined. Finally, several recommendations are offered as a means of achieving the objectives of the legislature.

Keywords

Minnesota legislature, legislative oversight, legislative controls, legislative objectives, executive control, agency

Disciplines

Administrative Law | Legislation

Comments

This article is co-authored by Neil W. Hamilton

LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE AGENCIES IN MINNESOTA

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Expansion in the authority of administrative agencies has resulted in a massive migration of policy decisionmaking from legislative bodies to executive branch agencies. This shift of power has created a problem of control over administrative rulemaking. In an attempt to exercise control over agencies, the Minnesota Legislature created the Legislative Commission for Review of Administrative Rules. The Supreme Court decision in Chadha, finding legislative vetos to be unconstitutional, has created a question of the constitutionality of the commission's power to suspend rules. Responding to the need for control, the authors have suggested a number of reforms to improve legislative oversight of administrative agencies.

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INTRODUCTION

Regulatory policy is an issue of current and long-term importance in Minnesota.¹ Over the last several decades, the state has created a vast array of administrative agencies to deal with economic, political, and social problems. The continuing expansion in the number, size and authority of agencies has resulted in a massive migration of policy decisionmaking from the legislative bodies to the executive branch agencies.

The direct costs of maintaining these bureaucracies make up a considerable portion of the state budget. The costs to society of compliance with the agencies' regulatory directives are also estimated to be high; some estimates run as high as \$160 billion per year including federal and state regulation.² These compliance costs do not appear in any governmental budget.

It is not surprising that as the cumulative impact of the decisions made by these various agencies at the federal level has increased, recent Presidents have felt it to be a political necessity to assert control over that for which they are politically ac-

1. Major portions of this article were submitted as a report on legislative oversight of regulatory agencies to the Committee on Rules and Administration of the Minnesota House of Representatives. The views expressed herein are those of the authors and do not necessarily reflect the views of the committee.

2. Rose, *Special Project on State Regulatory Reform*, 2 ARIZ. ST. L.J. 249 (1985).

countable.³ Congress has also responded with a variety of legislative oversight mechanisms and deregulation initiatives.⁴ In addition, scholars have noted that regulatory schemes were commonly perverse to their stated goals, not cost effective and unnecessarily anticompetitive in carrying out their mandate.

These same issues of agency control are of growing concern at the state level. As the federal government has reduced its role in some areas of regulation in recent years, state regulation has increased in importance. State regulation will thus play an increasing role in competition among states for business development. Moreover, as direct taxes become less feasible because of budget constraints, indirect taxation through regulatory fiat will become an increasingly attractive alternative. Finally, ill-advised agency action may be a greater risk at the state level than at the federal because of under-staffing and insufficient resources to thoroughly develop the data needed to reveal fully the costs and benefits of proposed action.

The legislature has an obligation both to hold agencies accountable to the people and businesses of Minnesota and to modify legislative mandates where necessary. To fulfill this obligation, the legislature must have the capability to exercise policy formation and oversight roles.

At present, the Minnesota Legislature lacks adequate means to achieve these goals consistently. The first step in achieving these goals is a survey of the regulatory reform mechanisms which have been suggested in scholarly literature and an investigation into regulatory reform mechanisms which have worked for the federal government and for other states. The second step in realizing effective legislative oversight is to tailor the most effective mechanisms of legislative control to the situation in Minnesota.

This Article will first examine the need for legislative oversight and the legislative oversight mechanism in Minnesota. Following this section is a discussion of legislative controls currently being used at the federal and state level. Executive control mechanisms and their possible use by a legislature will then be examined. Finally, several recommendations are offered as a means of achieving the objectives of the legislature.

3. For a discussion of Presidential control exercised over agencies, see *infra* notes 182-208 and accompanying text.

4. See *infra* notes 102-35 and accompanying text.

I. THE NEED FOR LEGISLATIVE OVERSIGHT

A. Background

The massive migration of policy decision-making power from the legislature to the executive branch agencies has created a serious problem of control.⁵ The problem is magnified because our principal charters, the United States and Minnesota Constitutions, speak only to three branches of government, the executive, legislative, and judicial branches. These charters do not address the issue of control of agency power.⁶ However, an understanding of the Constitutional framework for these three branches is essential to analyze the opportunities for and limitations on legislative oversight of agencies.

When our predecessors created the American constitutional government, they incorporated in their scheme a system of checks and balances. That system remains embedded in both the federal and Minnesota constitutions. It is not a system designed to promote efficiency, but to preclude the exercise of arbitrary power.⁷ Distributing governing power among three branches was thought to be a crucial means of avoiding autocracy. This separation of powers, combined with the touchstone of democratic government, the ballot box, was viewed as the best assurance that the government would remain under the control of the people governed. Though the modern administrative bureaucracy remains at bottom a creature of the legislature, the increased growth in the number of agencies and their delegated powers has caused the balance of governing power to tip heavily in favor of the executive branch. Furthermore, those who now exercise virtually all day-to-day governing power are administrators not directly responsible to the people through the chief vehicle for control in a democracy, the ballot box. Consequently, the central problem of administrative government and administrative law is the problem

5. See Scalia, *The Legislative Veto: A False Remedy for System Overload*, Nov/Dec 1979 A.E.I.J. ON GOV'T AND SOC'Y 19, 24.

6. See U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1; MINN. CONST. art. III, § 1.

7. See PIERCE, SHAPIRO, VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 2.1.2 (1985). The authors of this treatise state that the separation of powers is the result of the Federalist distrust of majority decisions. To provide for effective decision-making "and to guard against [governmental] abuse, each type [of authority] was committed to a separate, equal and independent group of persons." *Id.*

of control.⁸ How shall we control this useful and necessary invention of an administrative bureaucracy so as to ensure that the bureaucracy neither violates the legislative intent nor exercises governmental power arbitrarily?

Over the course of time, we have controlled the exercise of governing power in administrative hands in a variety of ways. These methods include increasingly vigorous judicial oversight and widespread public participation in the administrative decision-making process, coupled with the requirement of reasoned, non-arbitrary decision-making based on a public record.⁹ The need for legislative oversight to help control administrative government has not diminished. Indeed, there is a growing sense in Minnesota, as well as elsewhere, that the legislature must exercise greater control to assure that government power remains distributed and balanced as the Founders thought necessary, and that the key governing decisions remain in the hands of those answerable at election time to the people.¹⁰

B. Delegation of Legislative Powers to Agencies

The principal question confronting legislatures is what mechanisms of control will increase the accountability of the agencies? The best starting place is to look at the legislature's responsibilities in creating agencies.

It is clear that there are market defects like the failure of the market price to reflect the true social cost of producing a good.¹¹ The legislature must ensure, for example, that people have a safe working place, a clean environment, safe consumer products, and protection from unscrupulous business practices. At one time, regulation of such activities might have been done directly by the legislatures through the passage of

8. See *id.* § 3.1.

9. See *id.* § 5.1.1. The judiciary has two important roles in administrative law. First, courts enforce the constitutional constraints on agencies. Second, courts uphold legislative intent by reviewing agency action. *Id.*

10. The Administrative Procedure Act provides for procedural regularity and reasoned decision making in the administrative process. Minnesota's version provides more extensive protection than does the Federal Act. Compare 5 U.S.C. §§ 551-559 (1982) with MINN. STAT. §§ 14.01-.69 (1984).

11. PIERCE, *supra* note 7, § 1.5.3; see generally Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (discussion of government role in allocating costs of harm to others).

specific legislation.¹² The task of governing a growing and increasingly complex society has created a genuine need for the administrative bureaucracy, which is now the chief vehicle of American government at both federal and state levels.¹³ Legislatures cannot alone make the myriad of decisions necessary in the contemporary process of governing. At the same time, the community is also concerned about the costs of regulation and the degree to which policy judgments of an essentially political nature are made by unelected administrators.

Legislators must be more aware of the costs which regulation may impose in determining whether or not to regulate. Judge Stephen Breyer, formerly a Harvard law professor and Senator Kennedy's aide in charge of the first airline deregulation hearings, who is now on the Court of Appeals for the First Circuit, advocates that there must exist a serious market failure in order to justify the costs created by the regulatory agency itself.¹⁴

Before consideration of current legislative control ideas, it must be remembered and emphasized that virtually all admin-

12. See Scalia, *supra* note 5, at 26. Judge Scalia in a "letter" to citizens proposed the idea that Congress does not have the time to make these rules themselves.

13. See *id.* at 24.

14. See S. BREYER, REGULATION AND ITS REFORM 15 (1982). Judge Breyer states that while politics may be a reason legislation is passed, the failure of the market place to solve a problem is the justification for the legislation. *Id.* Judge Breyer presses the theme that competition is a very powerful form of regulation, not subject to political manipulation, and should be relied upon in a market economy to keep prices down and services up. See *id.* at 16-17. Since a regulatory bureaucracy imposes its own costs, and bureaucracies are hard to dismantle once established, regulation should only be imposed when market failure is significant. See *id.* at 23-26. In discussing regulation of spillover (i.e. difference between true social costs and unequal price), Judge Breyer advocates that regulation "should be confined to instances where the spillover is large, fairly concrete, and roughly monetizable." *Id.* at 26. In existing regulated industries like transportation, communications, or banking, we should ask whether market failure continues to be significant or whether market conditions have changed so that competition can be restored as a principal form of regulation. *Id.*

If a market defect is serious, Judge Breyer advocates matching the least intrusive regulatory tool with the regulatory problem. *Id.* at 184-85. He also advocates that the problems of "classical regulation" warrant using the regulation that is the least restrictive. *Id.* For example, it was one of Congress' great mismatches to address the problem of windfall profits in the natural gas market by imposing price regulation. Even if we assume the profits were "excessive," a tax would have been a simple, less intrusive, and ultimately less costly solution. *Id.* at 240-60. Judge Breyer links the shortage of fuel in the 1970's to industry regulation instituted in the middle 1950's. Initial legislative caution in creating and empowering agencies will help alleviate the control problem.

istrative agencies are creatures of the legislature.¹⁵ The considerable power these agencies exercise is the power given in the Constitution to the legislative branch.¹⁶ Just as that power has been delegated by statute in the first place, it can also be abolished, or more practically, modified or limited in some way by legislation. Of course, legislatures are constantly fiddling with agency power, limiting, or more often, expanding it as they see fit. Limiting agency authority in reaction to a legislative judgment that the agency is too broadly empowered is only one approach to legislative control. It surely behooves all legislators, even in the hustle and bustle of a busy session, to accept responsibility for questions of an essentially political nature. Legislators must bring all available foresight to every decision to delegate power, and only delegate so much of the legislature's power as is needed to respond to the problem that leads to such delegations of authority.¹⁷

C. *Standardless Agency Delegations*

The first line of defense against "excessive" agency power is thoughtful consideration of the power the agency needs and carefully crafted legislation that delegates only that authority and no more.¹⁸ Surely there are few, if any, circumstances that justify a standardless legislative delegation of power. There are, however, three types of standardless delegations. In some cases, Congress has failed to provide any standard, as when the President was authorized to "stabilize" prices and wages to prevent inflation without any limitation on his scope of ac-

15. See *PIERCE*, *supra* note 7, § 2.2. Administrative agencies were initially created to assist "economic growth by subsidizing business or the purchase of public goods." *Id.* The latter half of the 1880's saw the increase of regulation to combat monopolies, unscrupulous industries, and corrupt politics. *Id.*

16. *Id.* Technically, administrative agencies exercise the legislative power given to the legislature in the Constitution. Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

17. Scalia, *supra* note 5, at 24. There are, however, many forces at work in the legislative process which tend to generate broad and vague delegations of legislative power. See Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 AD. L. REV. 239, 271-72 (1984).

18. *PIERCE*, *supra* note 7, § 3.1. Congress has a variety of methods to control agency activity. "The enabling legislation under which an agency will operate can specify its degree of authority." *Id.* Congress can also pass subsequent legislation to limit an agency's authority. *Id.*

tion.¹⁹ A second type of standardless delegation is so broad that its interpretation is elastic.²⁰ A third type of standardless delegation sets forth a laundry list of standards so inconsistent that any agency action can be defended as consistent with one of the standards.²¹

Such unbridled delegations of power to an agency place the most fundamental policy decisions in the hands of bureaucrats who, no matter how "expert," are nonetheless unelected. It represents a legislative abandonment of the legislature's duty at least to define the public interest before authorizing an agency to pursue that interest.

II. LEGISLATIVE OVERSIGHT IN MINNESOTA

A. *The 1974 Amendments to the Minnesota Administrative Procedure Act*

The Minnesota Legislature's response to the need for agency control was the adoption in 1974 of amendments to the Minnesota Administrative Procedure Act (MAPA), including the creation of the Legislative Commission to Review Administrative Rules (LCRAR).²² The MAPA was a response to several basic concerns of the legislature. First, it was felt that agencies were making rules with virtually no check on that power.²³ Second, there was a decided lack of public participation in the rulemaking process.²⁴ Third, there was a real or perceived lack

19. *Id.*; Economic Price Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796.

20. PIERCE, *supra* note 7, § 3.1. The Federal Communications Commission (FCC) is authorized to regulate radio signals in the "public interest, convenience and necessity" and has been able to regulate television networks even though the business does not usually involve any radio transmissions. 47 U.S.C. §§ 303, 307.

21. PIERCE, *supra* note 7, § 3.1. An example of this type of legislation is the Emergency Petroleum Allocation Act. The Act required regulations for: the mandatory allocation of petroleum products that protected the public health, maintained public services and agricultural operations, preserved a sound and competitive petroleum industry, allocated crude oil refiners to permit them to operate at full capacity, resulted in an equitable distribution of supplies to all parts of the country, promoted economic efficiency, and minimized economic distortion.

Id.; see 15 U.S.C. § 753(b)(1) (1982).

22. Act of March 30, 1974, ch. 355, § 69, 1974 Minn. Laws 611, 629 (codified at MINN. STAT. §§ 14.39-.40 (1984)).

23. *Goals and Purposes of the 1975 Amendments to the Minnesota Administrative Procedures Act*, 2 MINN. STATE BAR ASS'N, AD. L. NEWS (Feb. 1984) [hereinafter cited as AD. L. NEWS].

24. *Id.*

of fairness in the process.²⁵

The legislative hearings on the adoption of the MAPA bill emphasize the perceived problem. One concern expressed at the hearings was that the definition sections of the Minnesota Administrative Procedure Act; particularly, the definition of "rules," were too ambiguous.²⁶ The ambiguity allowed agencies to make rules without following MAPA because they were arguably not promulgating "rules." Instead, agencies classified their actions as guidelines, internal memoranda, policy statements, and the like.²⁷ Related to this problem was MAPA's provision for after-the-fact justification of rules.²⁸ Finally, there were no set guidelines for an individual to appeal to an agency to change a rule.²⁹

A second concern of the legislature in 1975 was the lack of public participation in rulemaking. Even though an agency had to provide thirty days notice prior to hearings, it did not have to publish a copy of the proposed rule.³⁰ The result was that often the only input at hearings were opinions that had been sought out by the agency. Those most directly affected had little or no opportunity to be heard. Finally, many people perceived the rulemaking process as unfair. That perception, rightly or wrongly, stemmed from the fact that hearings on

25. *Id.*

26. See Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 164-67 (1979). Before adoption of the 1975 amendments to the Minnesota Administrative Procedure Act (MAPA) "rule" was defined as "every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure" MINN. STAT. § 15.04011(3) (1974). The revised definition included "every action statement of general applicability and future effect, including the amendment, suspension, or repeal thereof" Act of June 4, 1975, ch. 380, § 1, 1975 Minn. Laws 1285 (originally codified at MINN. STAT. § 15.0411(3) (1976), *renumbered and amended at* MINN. STAT. § 14.02, subd. 4 (1984)).

27. See Auerbach, *supra* note 26, at 156. The statute was amended by Act of May 3, 1984, ch. 640, § 26, 1984 Minn. Laws 1783 (codified at MINN. STAT. § 14.44 (1984)).

28. See Auerbach, *supra* note 26, at 203-11. Generally, if there was a challenge after a rule had been promulgated, the agency could justify its authority and the necessity of the rule. The Attorney General was to review the rule for form and legality, but no statement of need and reasonableness was required.

29. AD. L. NEWS, *supra* note 23. "Identified as a problem by the legislature as early as 1954, the promulgation of informal rules with no notice or hearing, no agency justification, often no required legal authority and rarely any review, gave the impression of a 'we know what's best' agency attitude." *Id.*

30. See MINN. STAT. § 15.0412, subd. 4 (1971).

proposed rules were conducted by the agency that had proposed the rules.³¹

The legislature's initial reaction to the perceived agency problem was to amend MAPA. One proposal was to require an agency to publish notice in the Minnesota Register of its intent to solicit information on a rule.³² This would be required for any action on a rule-adoption, suspension, amendment, or repeal.³³

In response to concerns that agencies were avoiding MAPA under the existing "regulation" definition, a more broadly encompassing definition was proposed.³⁴ Coupled with this was a requirement that the agency "make a showing *at the public hearing* of the need for and reasonableness of the proposed rule."³⁵

The most widely accepted proposal was the creation of an independent hearing examiner's office.³⁶ The independence of the office was seen as a step toward fairness in rulemaking. The only real criticism of the proposal was that the cost of rulemaking would be increased. The legislature passed the proposal with no substantive changes.³⁷

B. The Legislative Commission to Review Administrative Rules

Acceptance of the idea of an independent office to oversee agency regulation led to the creation of the Legislative Commission to Review Administrative Rules (LCRAR).³⁸ A brief overview of the commission and its procedures is necessary to understand the problems raised by the powers granted to it.³⁹

The LCRAR is composed of ten members, five from each house of the legislature.⁴⁰ The chair alternates from house to

31. AD. L. NEWS, *supra* note 23.

32. *See id.*

33. *See id.*

34. *See id.*

35. *Id.* (emphasis in original).

36. *See id.* The proposal was espoused by the Minnesota Association of Commerce and Industry (MACI) and the Minnesota State Bar Association (MSBA). Agencies also offered support for the independent office.

37. *See id.*

38. MINN. STAT. §§ 14.39-40 (1984).

39. *See infra* notes 60-81 and accompanying text.

40. MINN. STAT. § 14.39. The statute provides that "[a] legislative commission for review of administrative rules, consisting of five senators appointed by the com-

house biennially.⁴¹ The duties of the LCRAR are to promote adequate and proper rules, promote public awareness of the rules, and to report to the Governor and Legislature every two years on LCRAR activity.⁴²

1. *Process of Review*

The LCRAR may hold public hearings to investigate complaints and to review recommendations to improve rules.⁴³ The LCRAR may review an agency decision not to follow the Chief Administrative Law Judge's recommendation that need and reasonableness of a rule have not been established.⁴⁴ The LCRAR also has the power to suspend agency rules after it receives advice from the appropriate standing legislative committees.⁴⁵ The suspension is effective until the adjournment of the next session of the legislature.⁴⁶ If a bill is enacted, the rule is repealed. If the legislature does not respond, the rule again becomes effective and cannot again be suspended.⁴⁷

The official rule review process begins when a complaint is filed.⁴⁸ The request to review may be made to LCRAR directly, or to a senator or representative.⁴⁹ The LCRAR staff will make a preliminary assessment to determine if review is necessary.⁵⁰ Factors to be considered in determining if review

mittee or committees of the senate and five representatives appointed by the speaker of the house of representatives shall be appointed." *Id.*

41. *Id.* "The legislative commission chairmanship shall alternate between the two houses of the legislature every two years." *Id.*

42. MINN. STAT. § 14.40. The statute provides that the "commission shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them." *Id.* Furthermore, the Legislative Commission to Review Administrative Rules (LCRAR) is required to "make a biennial report to the legislature and governor of its activities and include its recommendations to promote adequate and proper rules and public understanding of the rules." *Id.*

43. *Id.* The LCRAR "may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention." *Id.*

44. See Burek, *Advanced Rulemaking Practice: Role of the LCRAR*, ADVANCED PRACTICE UNDER THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT, 109-15 (November 30, 1984).

45. See *id.*

46. See MINN. STAT. § 14.40. The committee must introduce a bill to repeal the rule at the next legislative session. *Id.*

47. *Id.* If the legislature does not enact the repeal, "the rule is effective upon adjournment of the session unless the agency has repealed it." *Id.*

48. See Burek, *supra* note 44, at 111.

49. *Id.*

50. *Id.* at 112.

is necessary include: a challenge to statutory authority for the rule; an allegation that the rule is contrary to legislative intent; an allegation that proper procedures were not followed in adoption; or that the rule does not meet the necessary and reasonable requirement.⁵¹ If the complaint has merit, the staff will recommend review.

The LCRAR review hearing is an informal process. Agencies should be represented by someone with the authority and knowledge to adequately present the agency's position. The hearing is open to any interested parties. At the conclusion of the hearing, the LCRAR will ask the staff to research the dispute and make recommendations.⁵²

The staff will continue to seek a resolution to the dispute. If the dispute cannot be resolved, another hearing will be held. The staff will outline the dispute and make recommendations for LCRAR action. The most common action recommended has been the referral of issues to the appropriate standing committee.⁵³ Modification of the rule is also frequently recommended.⁵⁴ After the LCRAR takes action, the staff follows up to assure agency compliance with the action.

2. *The Power to Suspend Rules*

The LCRAR's ultimate power is to suspend the legal effect of any rule.⁵⁵ The LCRAR must refer the question of suspension to the President of the Senate and the Speaker of the House for referral to a standing committee.⁵⁶ Committees have sixty days to make recommendations to the LCRAR. These recommendations are advisory only.⁵⁷ The LCRAR then makes a final vote on suspension. Notice of suspension must be published in the State Register, and the suspension is effective five days thereafter.⁵⁸ The LCRAR must then introduce a bill in the next legislative session to repeal the rule permanently. The power to suspend rules could have a far-

51. *See id.*

52. *Id.* at 113.

53. *Id.*

54. *Id.*

55. MINN. STAT. § 14.40 (may suspend any rule complained of by affirmative vote of at least six members provided the provisions of section 14.42 have been met).

56. Burek, *supra* note 44, at 110.

57. *Id.*

58. For discussion of suspension powers, see *supra* notes 50-53 and accompanying text.

reaching impact on agencies. The power, however, is rarely invoked.⁵⁹

C. *Constitutionality of the Power to Suspend*

The LCRAR was developed in response to concerns of runaway agency power. Its power to investigate complaints and negotiate with agencies concerning them appears to be effective.⁶⁰ However, the LCRAR power to suspend rules is almost certainly unconstitutional in light of the United States Supreme Court's holding that the legislative veto is unconstitutional.⁶¹ In *Immigration & Naturalization Service v. Chadha*,⁶² the United States Supreme Court held that the legislative veto violated the bicameralism and presentment clauses of the

59. The LCRAR received approximately 500 informal inquiries and complaints and docketed 71 of them in the period 1979-80. See 1979-80 LEGIS. COMM'N TO REV. AD. RULES REP. TO GOVERNOR & LEGIS. 8 [hereinafter LCRAR REP.]. In 1983-84, the Commission received 67 inquiries and complaints and docketed 24 of them. Leg. Comm'n to Review Ad. Rules, Receipt of Complaints/Inquires by Legislators to the Legislative Commission to Review Administrative Rules (LCRAR) (Sept. 1985) (unpublished statistical report). The LCRAR considered suspension of rules nine times in the period from 1980 to 1985. Only two of these proceedings resulted in the suspension of rules. Letter from Maryanne Hruby, Executive Director of the LCRAR, to Neil Hamilton (Nov. 5, 1985) (copy on file at the William Mitchell Law Review office). The statutorily mandated biannual report to the Governor and Legislature for the years 1979 and 1980 was issued December 30, 1980. The 1981-82 report was never issued. The 1983-84 report was issued on November 27, 1985. See LCRAR REP., *supra*, 1983-84 LEGIS. COMM'N TO REV. AD. RULES REP. TO GOVERNOR & LEGIS. 1.

60. See Frickey, *The Constitutionality of the Legislative Veto in Minnesota*, THE FUTURE OF THE STATE LEGISLATURE, HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, UNIV. OF MINN. 11 (Sept. 1985). Professor Frickey states that:

It appears that LCRAR has frequently performed a useful function in mediating disputes between agencies and citizens affected by administrative rules. LCRAR has been generally reluctant to suspend rules, preferring in those cases deemed to merit its attention to encourage a compromise between the agency and aggrieved citizens. That a compromise apparently was often achieved is a tribute both to the staff of LCRAR, who carried out the function of mediator, and to the simple fact that direct legislative pressure from the LCRAR and indirect legislative pressure through the budgetary process and other means render agencies particularly responsive in these circumstances. LCRAR apparently has provided a forum in which legitimate problems with rules have been ironed out, often with the full cooperation of all parties.

Id.

61. See *infra* notes 62-67 and accompanying text.

62. 103 S. Ct. 2764 (1983) (alien whose suspension of deportation had been vetoed by one house of Congress sought review of deportation).

United States Constitution.⁶³ The key reasoning in the case is the Court's determination that an action is legislative if it has "the purpose and effect of altering the legal rights, duties and relations of persons including the Attorney General, Executive Branch Officials and Chadha, all outside the legislative branch."⁶⁴ This is an extremely broad definition. If an action is legislative, it must be taken pursuant to the bicameral requirement and the Presentment Clause.⁶⁵

The Supreme Court also observed that Congress' decision to deport Chadha, no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves "determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."⁶⁶ As Judge Antonin Scalia has noted, the presentment clause "was meant to ensure presidential participation in *all* lawmaking, under whatever form it might disguise itself."⁶⁷

In another legislative veto case, *State v. A.L.I.V.E. Voluntary*,⁶⁸ the issue was the constitutionality of an Alaska statute which provided that the legislature, by concurrent resolution, could annul an administrative agency regulation.⁶⁹ According to the Alaska Supreme Court, this two-house veto was an act of legislation: "When the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legisla-

63. See *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2782-84 (1983).

64. *Id.* at 2784.

65. See *id.* at 2784-87. The court discusses the constitutional mandates of bicameralism and exceptions to the requirement. The court states that the Constitution is explicit in providing exceptions to the bicameralism requirement. No such exception applied in *Chadha*. *Id.* at 2786-87. Article I, section 1, of the United States Constitution provides that legislative powers are vested in both the Senate and the House, and article I, section 7, provides that every order, resolution or rule to which the concurrence of the Senate or House may be necessary shall be presented to the President. See U.S. CONST. art. I, § 2; *id.* art. I, § 7.

66. *Chadha*, 103 S. Ct. at 2786.

67. Scalia, *supra* note 5, at 20 (emphasis in original).

68. 606 P.2d 769 (Alaska 1980) (unincorporated association sued Department of Revenue alleging denial of permit allowing operation of lotteries was wrongful since denial was based on continuing enforcement of a nullified regulation).

69. *Id.* at 770.

ture it may do so only by following the enactment procedures”⁷⁰ set out in the State’s constitution. Those procedures require approval by a majority of both houses and presentment to the governor.⁷¹ The legislature in Alaska proposed a number of theories to support the constitutionality of the veto, but each was rejected by the court which emphasized that the legislature is bound to follow the constitution strictly. In particular, the court recognized the practicality of the argument that legislative oversight would be cumbersome if strict constitutional requirements had to be met.⁷² It rejected the argument, however, because of “recent studies showing that the ‘legislative veto encourages secretive, poorly informed action.’ ”⁷³ Finally, the Alaska court observed that there is no “principled distinction” between the two house veto at issue and the veto power exercised by a legislative committee.⁷⁴

The other state legislative veto cases follow essentially the same analytical path. This emphasizes that legislative action affecting the legal rights or duties of others is legislation and that the law-making process set forth in the relevant constitution must be adhered to strictly.⁷⁵

Concerning this issue, the Minnesota Constitution is similar in all important respects to those of the United States and Alaska. The Minnesota Constitution provides for a strict separation of powers among the legislative, executive, and judicial departments.⁷⁶ The Minnesota Supreme Court has declared that a constitutional grant of power to one of the branches is a

70. *Id.* at 773.

71. *Id.* at 772.

72. *Id.* at 778-79.

73. *Id.* at 779 (citing Bruff & Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1409-20 (1977)).

74. *Id.* at 778.

75. *Reith v. South Carolina State Hous. Auth.*, (Ct. Comm. Pleas 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847 (1976); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738, 742 (1950); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 633 (W. Va. 1981).

76. MINN. CONST. art. 3, § 1. The constitution provides:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Id.

denial of that power to the others.⁷⁷ The law-making power is assigned to the legislature. The constitution provides that no law shall be passed unless approved by a majority of each house,⁷⁸ and that bills approved by both houses must be presented to the governor for his approval or veto.⁷⁹ The supreme court has emphasized that "a *bill* never becomes a *law* until all the constitutional prerequisites respecting manner of enactment have been fully complied with."⁸⁰

All of this indicates that in Minnesota, as in the *Chadha* and *A.L.I.V.E. Voluntary* cases, any legislative action meant to have the effect of law must be the product of the law-making process described in the Minnesota Constitution and no other. Nor is it constitutionally feasible for the legislature to circumvent the constitutional limitations by creating an "executive branch" agency with rule veto or suspension power and then providing that legislators be appointed as members of that agency. The state's constitution prohibits any legislator from also holding another public office (except postmaster or notary public).⁸¹

The principal argument that the LCRAR's power is not unconstitutional is that the suspension process is statutory and that no suspension is permanent.⁸² To repeal the rule permanently, a bill must be introduced in the next legislative session and passed by usual enactment procedures. It is hard to distinguish the power to suspend rules which otherwise have the force and effect of law from the power to veto them. Surely the

77. *Bloom v. American Express Co.*, 222 Minn. 249, 256, 23 N.W.2d 570, 575 (1946).

78. MINN. CONST. art. 4, § 22. The constitution provides for the passage of laws as follows:

The style of all laws of this state shall be: "Be it enacted by the legislature of the state of Minnesota." No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature, and the vote entered in the journal of each house.

Id.

79. MINN. CONST. art. 4, § 23. The constitution also has a presentment clause stating that "[e]very bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor." *Id.*

80. *State ex. rel. Foster v. Naftalin*, 246 Minn. 181, 187, 74 N.W.2d 249, 254 (1956).

81. MINN. CONST. art. 4, § 5; see also *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980).

82. Burek & Marinac, *Constitutionality of the LCRAR's Power to Suspend Rules: A Reply to Dean Goldberg*, 3 MINN. STATE BAR ASS'N, AD. L. NEWS, (Oct. 1984); Goldberg, *Comment on the Constitutionality of the LCRAR*, 2 MINN. STATE BAR ASS'N, AD. L. NEWS, (June 1984).

suspension is a legislative act altering the legal rights of persons outside the legislative branch within the meaning of *Chadha*.⁸³ Where is a principled line between the power to suspend rules for six months, eighteen months, five years, or a veto? The suspension is also carried out by a committee of the legislature, and is thus more suspect than the action of one or both houses.

If the state constitution were amended to specifically allow for legislative oversight by a joint legislative oversight committee wielding suspension or veto power, then these constitutional concerns would be eliminated. Article III of the Minnesota Constitution, providing for a division of power among three distinct "departments," could be amended to delegate veto or suspension power to the legislature. Four states have amended their constitutions to provide for some form of legislative veto or suspension power.⁸⁴

Though a constitutional amendment along any of these lines would eliminate the constitutionality concerns surrounding LCRAR's existing suspension power, it would raise important policy problems. Committee oversight by means of rule suspensions or vetoes can result in cursory, unsystematic review

83. See *Chadha*, 103 S. Ct. at 2784.

84. The Connecticut Constitution provides as follows:

The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive to another; and those which are judicial to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

CONN. CONST. art. 2.

The South Dakota and Michigan constitutions more narrowly provide for joint committee rule suspension power. The South Dakota Constitution provides that:

The Legislature may by law empower a committee comprised of members of both houses of the Legislature, acting during recesses or between sessions, to suspend rules and regulations promulgated by any administrative department or agency from going into effect until July 1 after the Legislature reconvenes.

S.D. CONST. art. III, § 30.

The Michigan Constitution provides as follows:

The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session.

MICH. CONST. art. IV, § 37.

Several other states have rejected such constitutional amendments.

of agency rulemaking. The circumstances giving rise to the *Chadha* case provide a good example. Congress did not take up the veto question until a year and a half after the Attorney General's grant of a hardship exemption to Mr. Chadha.⁸⁵ The Judiciary Committee reported the veto resolution to the full House only four days after it was introduced and before it had been printed and given to members of the House not on the Committee.⁸⁶ There was no debate or recorded vote on the resolution.⁸⁷ It was passed after a very short statement made by Representative Eilberg to the effect that the Committee believed the veto was required by the Immigration Act.⁸⁸ There is some doubt as to whether either Representative Eilberg or other members understood the consequences of passing the veto resolution. In short, the vote in *Chadha* appears to have been made in haste and on the basis of little information as to the consequences of the House's action. No discussion of immigration policy or foreign policy was involved in this decision. Involvement by the entire legislature in the oversight process seems more likely to provide a considered review of the agency action in question, and of course, it provides a greater guarantee that the resulting action fairly represents the policy view of the entire legislature.

There are additional reasons why legislative vetoes or other non-statutory suspensions of administrative rules should be avoided. As a comment to the Model State Administrative Procedure Act points out, judicial review already provides an effective check against most unlawful rules.⁸⁹ The legislative mechanism for veto or suspension will be utilized primarily as a check against *unwise* rules that are otherwise clearly lawful. If the power to suspend has a practical impact principally on lawful rules, it constitutes a narrowing of the authorizing legislation and should be executed in the same manner as

85. *Chadha*, 103 S. Ct. at 2771.

86. *See id.*

87. *Id.*

88. *Id.* Representative Eilberg is quoted as stating:

It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended.

Id.

89. MODEL STATE ADMIN. PROCEDURE ACT § 3-204, Commissioner's comment [hereinafter cited as MODEL STATE APA].

authorizing legislation. Otherwise, a committee of the state legislature would continually be in a position "to subvert proper authorizing action of a more representative and authoritative lawmaking process with built-in checks and balances."⁹⁰

Another reason for repealing the suspension power is that it is not the most effective method of control. It is at best a reactive tool that allows the legislature to express its displeasure with a previously made agency decision. It does not necessarily provide an agency with policy guidance for the future nor is it very efficient. To veto a rule after all the effort has been expended, both in and out of government, to promulgate that rule is counter-productive.

Despite the arguments on behalf of LCRAR's suspension power, the power to suspend is almost certainly unconstitutional.⁹¹ Nevertheless, there continues to be strong legislative interest in means of legislative control. While the difficult process of constitutional amendment may provide a partial solution, there are a number of alternative methods of legislative control than can be developed and used more effectively. Sections III and IV of this Article explore the mechanisms of legislative and executive control utilized by the federal government and other states which the Minnesota Legislature might borrow.

III. MECHANISMS OF LEGISLATIVE CONTROL

A. Federal Legislative Control

In the wake of the Supreme Court's holding in *Chadha* that the legislative veto is unconstitutional, Congress has been examining alternative methods of control. Congress now uses a variety of statutory and non-statutory control mechanisms which "range from explicit statutory overrides of an offending regulation and removal of the agency's jurisdiction, to indirect influences such as critical oversight hearings and directives in committee reports."⁹² Because of the wide variety of tech-

90. *Id.*

91. If it is reasonably clear that LCRAR's suspension power is unconstitutional, one might reasonably ask why it has not been challenged in court. The authors think the answer lies in the extreme reluctance of any administrative agency to challenge the legislature which provides its continuing authorizations. Also, in some instances it may be difficult for some party other than the agency to obtain standing to bring a constitutional challenge.

92. Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha*

niques used, their effectiveness is difficult at times to ascertain. Therefore, Congress attempts, on a case-by-case basis, to determine which control mechanism will be most effective in a given situation.

The available alternatives can be divided broadly into two categories. The first category is control by statutory authority.⁹³ The second involves control through non-statutory methods.⁹⁴

1. *Statutory Mechanisms*

Statutory mechanisms are traditional tools which historically have not proven very useful.⁹⁵ Nonetheless, Congress continues to utilize them, even those of suspect constitutional stature. The plain fact of the matter, especially in the wake of *Chadha's* emphasis on the formalisms of the legislative process, is that the only formal and constitutionally sound method available to a legislature to control administrative discretion is to enact a statute. Whether in the initial delegation of power to an agency or in subsequent legislation to limit or control the agency, the legislature faces the same problems that make effective control by legislation difficult to achieve.

The process of statutory enactment is a process of compromise and accommodation of competing interests. This tends to be true even when one political party is very dominant because intra-party factions may compete for the result most favorable to their perceived interests. The result of this democratic process of compromise and accommodation is often a statute written so broadly that it encompasses the aims of many whose more specifically delineated aims are quite different. Then, when the agency attempts to determine the legislature's intent, the honest answer is that no clear intent was expressed because to do so would have offended some interests needed to get the bill passed. This means that the agency has a broad, vague, and standardless directive that effectively allows the agency to choose the policy direction that the legislature could

Decision, 36 AD. L. REV. 239 (1985) (methods of legislative and executive oversight described in detail).

93. See *id.* at 243-66.

94. See *id.* at 266-70.

95. See generally Rose, *Special Project on State Regulatory Reform*, 1985 ARIZ. STATE L.J. 249 (discussion of need for reform at the federal and state level).

not. Thus, perhaps, a majority of the legislators will conclude that the agency has gone in an unintended direction.

The description of this phenomenon is not a criticism of the workings of the democratic process. It simply emphasizes the need for the legislature to be clear and precise in its directives to agencies because of those forces at work in the process which tend toward the opposite result of vague directives. A legislature may, however, be criticized for abandoning its responsibility for making the fundamental policy choices when it is done simply to avoid political accountability.

Despite the difficulties in making these statutory controls effective, Congress has continued to use a variety of approaches. Perhaps the most obvious approach used by Congress is to pass legislation which preempts a questionable agency regulation. Congress has done this a number of times.⁹⁶

Congress has also specifically overturned certain agency decisions.⁹⁷ The obvious drawback to the specific statutory enactment approach is the time and effort required to enact such legislation. It is also obvious that this approach can only work where there is sufficient political interest and consensus to pass a statute. However, the constitutionality of this approach to legislative control is above question since it amounts in effect to a resumption by Congress of legislative power earlier delegated to an agency.

A similar method of control is to pass legislation which does not specifically overrule an offending regulation, but merely modifies agency jurisdiction.⁹⁸ There are numerous ways to accomplish this.⁹⁹ Congress may change the scope of the agency jurisdiction or remove jurisdiction altogether. Placing moratoria on specific agency actions has also been used. De-regulation has also been effective. This modification of jurisdiction has recently become a more favored method of agency

96. *Id.* at 244-47. For example, Congress set out in the statute specific language to be used in labelling saccharin products. 21 U.S.C. § 343 (1982). Such a determination might have been left to the Food and Drug Administration. In that instance, there was no delegation of regulatory power over saccharin labeling to the FDA at all. Congress decided for itself a matter which usually would be left to an agency to decide.

97. In 1976, Congress overturned a motorcycle helmet safety standard promulgated under the Federal-Aid Highway Act. Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 208(a), 90 Stat. 425, 454 (codified at 23 U.S.C. § 402 (1982)).

98. Kaiser, *supra* note 92, at 247.

99. *Id.*

control.¹⁰⁰

Appropriations limitations are another mechanism that is used to prevent an agency from pursuing a particular course of action. The limitation can be used to expressly deny use of funds for a specific activity or for a category of activities. The method is "straightforward, unambiguous, direct, and virtually self-enforcing."¹⁰¹ An example of limiting a category of activities would be restrictions on enforcement, rulemaking, issuing grants, and the like. Examples of restrictions on a specific activity include prohibiting economic aid to a particular country or denying appropriations for military research on a particular project.

The use of appropriation limitations is not without drawbacks. One basic problem is that the limitations are only effective during the appropriation time period. This is usually one fiscal year or less. Additionally, use of appropriation bills to propose new legislation or to amend legislation conflicts with House and Senate rules.¹⁰² The House, beginning with the 98th Congress in 1983, has instituted a rule which limits the number of riders that may be attached to appropriations bills.¹⁰³ Proponents of the House rule viewed such riders as a "manifestation of single-issue politics that directly challenged the congressional leadership."¹⁰⁴ Furthermore, the use of some riders has led to Presidential vetoes which resulted in temporary, partial closing of some agencies.¹⁰⁵ Despite the inherent

100. One of the more prominent uses of this approach is the Federal Trade Commission Improvements Act of 1980 in which Congress set limitations on the FTC's ability to regulate trade groups that set industry or product standards. The same Act also limited the FTC's power to regulate television advertising with regard to children. One advantage of this method is that it may be used so that its effect is only temporary. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374-97 (1980) (codified in scattered sections of 15 U.S.C. (1982)).

101. Kaiser, *supra* note 92, at 252.

102. W. Brown, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 403, 95th Cong., 2d Sess. 525 (1979) (House Rule XXI); COMM. ON RULES AND ADMIN., UNITED STATES SEN., STANDING RULES OF THE UNITED STATES SENATE (1979) (Senate Rule XVI). For more complete discussion, see generally Fisher, *The Authorization - Appropriation Process in Congress: Formal Rules and Informal Practice*, 29 CATH. U.L. REV. 68 (1979).

103. See Kaiser, *supra* note 92, at 252.

104. *Id.*

105. *Id.* at 253 n.62. For example, President Carter vetoed the appropriations bill for the State, Justice, and Commerce Departments because it contained a rider which prevented the Justice Department from instituting law suits that could lead to "court-mandated school busing for desegregation purposes." *Id.*

problems with appropriation limitations, they are being used more frequently.¹⁰⁶

Another similar method of control is through authorizations. Authorizations are the official Congressional approval through budgetary means for an agency to be created or continue in operation.¹⁰⁷ Authorizations may also define what areas an agency is to regulate. Although they are less commonly used to control specific actions, they are widely used in specific areas.¹⁰⁸ Repeated review of agency actions to renew authorization provides on-going control of executive actions. Regular and frequent authorization periods may be mandated for agencies not already under a short cycle, thus providing more numerous opportunities for periodic review and leverage to enforce agency compliance with legislative intent.¹⁰⁹

The budgetary authorizations are not a foolproof method of control. The authorization may not pass both houses or the President may veto the bill. Authorizations do, however, encourage discussion of the issues, determine the amount of support for a policy, initiate future legislative action, and influence public participation. If the authorization limitations are enacted into law, the effect may be to enhance the political support for or against agency policies.¹¹⁰ Closely related to short

106. One example is the Department of Defense Appropriation Act of 1983, Pub. L. No. 97-377, 96 Stat. 1833. The Act contains a number of restrictions on the Department. These restrictions range from small day-to-day activities to the most far-reaching policies. The MX funding cut is a dramatic example of the use of appropriations bills. The 97th Congress disallowed the entire \$988 million requested for development of the missiles. *Id.* at 1846-48. Congress provided that over 10 billion dollars was available for military development, but that none of it was to be used for MX research or implementation. Appropriation limitations serve as a continuing check on the Department.

107. See Kaiser, *supra* note 92, at 259.

108. *Id.* (citing Fisher, *Annual Authorizations: Durable Roadblocks to Biennial Budgeting*, 3 PUB. BUDGETING & FIN. 26-29 (1983)).

109. Kaiser, *supra* note 92, at 259. One notable example is the Federal Bureau of Investigation (FBI). The FBI had a permanent authorization since 1908. *Id.* at 259 n.90. As a result of the 1976 authorization statute, the authorization period for the FBI is now annual, instead of on-going. See *id.* The Chairman of the House Judiciary Committee, Peter Rodino, opined that "the Congress enacted the 1976 statute largely because the Judiciary Committee believed it could not adequately or responsibly discharge its oversight responsibilities without the lever of budgetary authorization." 124 CONG. REC. H13020 (daily ed. Oct. 14, 1978).

110. For example, the controls placed on CIA operations in Angola were embodied in the International Security Assistance and Arms Export Control Act of 1976. Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976) (codified at 22 U.S.C. § 2293 (1982)).

authorization periods, sunset requirements could be implemented to terminate a program, agency, or authorization at a specific date unless it is expressly reauthorized.¹¹¹

There are some statutory control mechanisms which are constitutionally suspect in light of *Chadha*, but which have not yet been challenged. One example is the use of committee vetoes. Basically, an enabling statute will provide that a rule is not to be promulgated until certain congressional committees have granted approval, or unless no disapproval is expressed. This has been most commonly used to require approval from House and Senate Appropriations Committees.¹¹² Requiring committee approval before an agency promulgation becomes effective, amounts to a delegation of the whole legislative power to the committees and is apparently unconstitutional in light of the Supreme Court's *Chadha* analysis. Under this approach, the act which makes the agency's promulgation "law" is the committee resolution. In *Chadha*, however, the Court concluded that such legislative acts can only be the product of the lawmaking process set out in the Constitution, a process involving both Houses of Congress and the President.¹¹³

Another variation on this theme is to provide that the agency's rule will be effective unless the committees express disapproval. This latter approach of course amounts to a committee veto power and is even further from satisfying constitutional requirements than *Chadha*'s one-house veto.

Despite these potential constitutional infirmities, at least a dozen committee veto provisions have been inserted in bills passed by Congress since *Chadha*.¹¹⁴ These have all been appropriations acts which affect agency spending. The committee approval requirement has become such a standard that it has even been written into some agency manuals of procedure.¹¹⁵ So far, the executive has not objected to the use of

111. To borrow a state rather than a federal example, the Minnesota Department of Energy and Economic Development's emergency rules governing the Waste Tire Recycling Program were withdrawn in July 1985 because the agency's authority to promulgate emergency rules expired on June 30, 1985. 10 Minn. Admin. Reg. 140 (July 22, 1985).

112. Kaiser, *supra* note 92, at 243-44.

113. See *Chadha*, 103 S. Ct. at 2787. The Court said an act was legislative if it "had the purpose and effect of altering the legal rights, duties and relations of persons." *Id.* at 2784.

114. Kaiser, *supra* note 92, at 243-44.

115. See *id.*

committee vetoes. Obviously, no agency is anxious to incur the displeasure of the appropriations committees by challenging the constitutionality of those committees' approval or veto powers.

The use of joint resolutions to control executive action has become increasingly popular and also presents potential constitutional problems. Since the joint resolution has already become a widely used alternative, the House Rules Committee has established procedures for implementing the resolutions.¹¹⁶ Under a joint resolution approach, a regulation is not put in force until both houses have approved and the President has signed. Failure to receive approval means the regulation would never take effect. There is probably no constitutional problem as long as both houses and the President act in concurrence, since this is simply passage of another statute. If *only* a joint resolution is required and there is no involvement by the President, the process is essentially the same as one which gives similar approval power to one or more committees. It is, therefore, likely to be unconstitutional. In addition, some commentators object to the joint resolution because once signed by the President, the proposed regulation becomes a public law. Agencies would no longer be making the regulations, and Congress would be subject to the inherent limitations of Congressional time, attention, expertise, and consequent lack of future flexibility in regulation.¹¹⁷ In the final analysis, the time expended makes the joint resolution a lengthy and impractical alternative for control of agencies.

A more recent mechanism of Congressional control is a statutorily mandated report and wait period so that Congress is informed in advance of planned agency action.¹¹⁸ The statute may require consultation directly with committees. Notice permits the legislature to review and plan for prospective agency action. If there is a reasonable time delay before the proposed action, Congress can have the opportunity to analyze the proposed action and make suggestions. Although the report and wait provisions do not authorize Congressional rejection of the agency's proposal, Congress may be able to influence the mod-

116. Kaiser, *supra* note 92, at 251. The procedures include time limitation, automatic sidecharges, and "closed rules" for joint resolutions.

117. See Kaiser, *supra* note 92, at 252.

118. *Id.* at 263.

ification of the proposal.¹¹⁹ Congress has frequently used this method.¹²⁰

Along the same lines as this prior notice of agency action to Congress, Congress can direct agencies to consult with each other. This provides an internal "check and balance."¹²¹ The Congress does not give one agency the power to prevent action by another agency. This method does, however, allow agencies to "interject alternative priorities, perspectives and recommendations."¹²² This could alter or even curtail a proposed agency action.¹²³

2. *Non-Statutory Methods*

There are a variety of informal control mechanisms used by Congress to guide the agencies. Most of these informal controls are of longstanding use. Their effectiveness depends upon a number of circumstances, but they can provide more effective limits on agency behavior than formal statutory con-

119. A current example of the use of this mechanism is the Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (codified in scattered sections of 50 U.S.C. (1982)). The Act requires that the Select Committees on Intelligence be "fully and currently informed of all intelligence activities . . . including any significant *anticipated* intelligence activity . . ." 94 Stat. § 501(a)(1) at 1981-82.

Additionally, the Act requires that the President provide advance notice of covert actions. The previous reporting act under the Hughes-Ryan Amendment required "timely" notice. *See* Kaiser, *supra* note 92, at 263-64. The advance notice even applies to situations where the action must be immediate. In these circumstances, the President must notify the leaders of Congress and later inform the intelligence committees in a "timely fashion." *Id.* The President's notice must give full disclosure of the operation and state the reasons why prior notice was not given. Even though the President does not have to have Congressional approval for these actions, the notice requirement allows for a discussion of the issues involved.

120. These report and wait provisions have also been applied to the Consumer Products Safety Commission (CPSC), the Nuclear Regulatory Commission (NRC), Housing and Urban Development (HUD), Interstate Commerce Commission (ICC) and others. *See* 15 U.S.C. § 2076(j) (1982) (CPSC); Act of Nov. 6, 1978, Pub. L. No. 95-601, § 1, 92 Stat. 2947, 2948 (NRC); 42 U.S.C. § 3542(a) (1983 Supp.) (HUD); 49 U.S.C. § 1 (1982) (ICC).

121. Kaiser, *supra* note 92, at 265.

122. *Id.*

123. One example of the inter-agency consultation requirement involves the Environmental Protection Agency (EPA). Whenever the EPA's jurisdiction coincides with that of another agency, or when the EPA's actions are controversial, the two agencies must consult on the proposed action. *See id.* For example, the EPA has to submit proposed regulations on pesticides to the Secretary of Agriculture. The Secretary's comments are then published in the *Federal Register*. The EPA must also consult with the NRC before regulating radioactive pollutants. *See id.*

trols. They also have the advantage of generally being easier to utilize.

One method that Congress can use to control future agency action is to provide precise, detailed committee reports accompanying legislation. These reports detail and explain expectations for future executive actions under the legislation thereby providing guidance to the agency.¹²⁴ The committee report, while it may not have the force of law, indicates to the agency what actions will be considered appropriate.¹²⁵ An agency which does not follow the committee recommendations may be inviting closer scrutiny of its actions.¹²⁶

Committee oversight hearings are another informal procedure to control agencies. The hearings are usually accompanied by a committee power to issue subpoenas. The oversight hearings make an issue visible and may eventually lead to Congressional changes in law based on a result of the investigation.¹²⁷

124. *Id.* at 266.

125. The report issued by the Senate Select Committee on Intelligence is indicative of the effect these reports may have. *Id.* at 266-67. The Committee issued two reports, a public and a classified report. H.R. REP. NO. 2968, PUB. L. NO. 98-215, 98th Cong., 1st Sess., reprinted in 1983 U.S. CODE CONG. & AD. NEWS 97 Stat. 1473. The House Appropriations Committee report on energy and water development appropriations for 1984 lists seven specific directives to be followed. H.R. REP. NO. 217, 98th Cong., 1st Sess. 138 (1983).

126. The Occupational Safety and Health Administration (OSHA) was subjected to additional limitations because it ignored comments in the House Appropriations Committee Report. Kaiser, *supra* note 92, at 267. The Committee was critical of OSHA enforcement in agricultural businesses. OSHA did not respond to Congressional concerns. See *id.* Eventually, Congress exempted from OSHA's jurisdiction agricultural operations of fewer than ten employees. Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418, 1421. Additionally, OSHA was prohibited from assessing certain civil penalties. *Id.*

127. The EPA provides an example of this method of legislative oversight. Extensive hearings in 1982 and 1983 were conducted as a result of criticisms about the EPA's lack of enforcement of the "Superfund" law's clean-up provisions. As of yet, the hearings have not resulted in legislation modifying the EPA's authority, but the agency is on notice that its actions are being examined. Kaiser, *supra* note 92, at 268.

Investigations into the intelligence agencies have, however, resulted in new legislation. Investigations by select committees in 1975-76 uncovered abuses of authority, illegalities, and unethical conduct. *Id.* The result was the creation of permanent Select Committees on Intelligence and passage of the Foreign Intelligence Surveillance Act which governs electronic surveillance. Act of Oct. 25, 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 18 U.S.C. §§ 2511, 2518, 2519; 50 U.S.C. §§ 1801-1811 (1982)). Generally, the Act prohibits wiretapping and other means of electronic surveillance except under specified circumstances. *Id.* It also requires the Director of the Administrative Office of the United States Courts to report to Congress the instances when wiretaps are approved. *Id.*

Analogous to the oversight hearings are investigations conducted by congressional staff, outside consultants, and congressional support agencies. These investigations may "help to induce changes in administrative behavior, challenge questionable conduct, or provide substantiation and recommendations for further congressional efforts to check executive actions."¹²⁸ Direct contacts do not guarantee changes will be made, but they do open up lines of communication.

One of the most informal control mechanisms occurs when senators or representatives consult with agency officials. Such contact is outside of the committee activity, providing an opportunity for both sides to offer opinions and suggestions.

Congressional resolutions could be passed which offer an indication of Congressional opinion on a proposed action or an existing action. Oversight powers could be increased to keep committees up to date on executive actions by requiring agencies to make reports periodically. In addition, select committees could be formed to carry out these monitoring activities. Finally, Congress attempts to control agency behavior indirectly in reviewing and approving some executive nominations of the administrators who will wield the powers delegated to the agencies.

These non-statutory methods of control, while potentially quite effective, depend in large part on political pressure. They may be more effective over a long period of continual Congressional pressure to change a general problem of agency behavior than on any single instance of agency policymaking. All of these statutory and non-statutory control mechanisms can be and to one extent or another, are employed by state legislatures as well.

B. State Legislative Control

The state legislatures have been active in instituting administrative agency control mechanisms. A major concern has been

128. Kaiser, *supra* note 92, at 270. An example is the negotiations between the Office of Personnel Management (OPM) and the Senate Governmental Affairs Committee regarding proposed rules governing federal salaries, promotions, and layoffs which resulted in a change in OPM policy. See 129 CONG. REC. S11431-36 (daily ed. Aug. 3, 1983). OPM had originally proposed regulations which would have instituted a "pay for performance" plan for civil service employees. As a result of the negotiations with the committee, the regulations were modified to resemble existing pay plans. *Id.*

the exercise of delegated rulemaking power. Approximately three-fourths of the states have some form of review of administrative rules.¹²⁹ Legislative review is used to ensure that an agency's actions comport with the legislative purpose and are within statutory authorization. The review process is viewed as an ongoing legislative control and monitoring system.¹³⁰ In most states, including Minnesota, the constitutional allocation of power among the legislative and executive branches gives rise to the same limitations and concerns that arise for Congress since the *Chadha* case.

In 1978, the National Conference of State Legislatures issued recommendations to curb the increased power of agencies.¹³¹ The Conference recommended that "legislatures establish procedures for reviewing all agency rules and regulations promulgated with the force of law under authority granted by the legislature, whether or not they are covered by the administrative procedure act."¹³² These review procedures should (1) clearly define an agency regulation; (2) require agencies to show any changes made to existing regulations; (3) require publication of regulations before they

129. *Legislative Review of Administrative Rules: An Update*, NAT'L CONF. STATE LEGIS., STATE LEGIS. REP. 1 (1982) [hereinafter cited as *Legislative Review Update*]. According to the article, 41 states had some type of agency review as of 1982. Twenty-six state legislatures had some form of legislative veto.

130. *Id.* For a discussion of legislative review of agency rule-making, see generally Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 113-23 (1982).

131. *Restoring the Balance: Legislative Review of Administrative Regulation*, NAT'L CONF. OF STATE LEGIS., LEGIS. IMPROV. & MOD. COMM., 9-10 (1978) [hereinafter cited as *Restoring the Balance*]. There are nine recommendations in all. The committee recommended that:

(a) "a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review function"; (b) "the strongest possible review structure be created in each state, consistent with the state's constitution"; (c) "the committee or committees designated to perform regulation review be adequately staffed by permanent legislative staff"; (d) "the review committee in each state have the authority to review all proposed and preexisting legislation"; (e) "reasonable time constraints be imposed to provide for adequate review and for expeditious final disposition of regulations"; (f) "procedures be established for promulgation of emergency regulations"; (g) "the review committee meet often enough to provide adequate review of proposed regulations"; (h) "that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rulemaking authority . . . be reviewed to assure that 1) legislative intent is clearly spelled out in the bill, and 2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill."

Id.

132. *Id.* at 9.

become effective; and (4) require all regulations to be submitted to the legislature for review.¹³³

Other recommendations of the Conference included establishment of a joint committee to perform the regulation review and the adoption of guidelines which assure that an agency is clearly informed of the legislative intent and the extent of its delegated powers.¹³⁴ The common thread of all the Conference recommendations is that the legislature is ultimately responsible for control of administrative agencies.¹³⁵

1. *Current State Legislative Overview Mechanisms*

The need for control is seen by legislators, by their constituents, and by scholars. Practical realities, however, often inhibit effective legislative control. Although careful oversight by legislatures is desirable, legislatures generally do not have the time to draft detailed legislation or review every administrative rule.¹³⁶ This problem of time constraints is most acute for part-time legislators, and may account for the frequent utilization of a joint committee to which legislative oversight is delegated.

A 1982 survey of legislative oversight of administrative rulemaking¹³⁷ showed that state legislative controls fell into a number of categories. Eleven states have not adopted any system of legislative supervision; they continue to rely on the general power of the legislature to enact statutes whenever needed.¹³⁸ Fifteen states have established advisory committees to perform systematic review of agency rules and to make recommendations for legislative action which must be done by statute.¹³⁹ One state has a one-house veto of agency rules.¹⁴⁰

133. *Id.*

134. *Id.*

135. *See supra* note 131 and accompanying text.

136. Scalia, *supra* note 5, at 24. Judge Scalia states that HEW's Office of Education has been subject to legislative veto since 1974. The veto, however, has had no real effect of ensuring "democratic control." He concludes, therefore, that the veto does not accomplish what was intended. Judge Scalia opines that legislatures "have had neither the time nor the inclination to review agency rulemaking, just as they have had neither the time nor the inclination to write more detailed legislation in the first place." *Id.*

137. Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

138. *See id.* at 96-97.

139. *Id.* at 98. This system is undeniably constitutional since final legislative action is by statute.

Eleven states have a two-house veto of agency rules. Three states had this type of system until it was declared unconstitutional.¹⁴¹ As of 1982, the electorates of four states had rejected constitutional amendments that would have authorized the two-house veto.¹⁴² Nine states, including Minnesota, permit final legislative action only by statute. These states, however, authorize a legislative committee to suspend the effectiveness of a rule for a limited time pending final legislative action.¹⁴³

Five states and the 1981 revision of the Model State Administrative Procedure Act (Model State APA) provide for final legislative action only by statute pursuant to recommendations from an advisory committee.¹⁴⁴ If the committee finds a rule objectionable, the committee's objection is published with the rule, and the agency has the burden of persuading the court that the rule is lawful in any subsequent litigation challenging the rule's validity.¹⁴⁵

The structure for legislative review of agencies in the various states can be divided into three broad categories. The first category encompasses review by substantive standing committees. Second, is review by a single joint committee. Sometimes this committee is created for the specific purpose of review and other times the committee carries out other functions. The final group is review by standing committees during the session and a joint committee during the interim.

The advantage to the first type of review, by a standing committee, is that the committee has expertise in the area.¹⁴⁶ Legislative review is divided according to substantive area of regulation and no one committee bears the entire burden. The disadvantage is that house and senate committees reviewing the same rule may disagree.¹⁴⁷ Another disadvantage is

140. *Id.* at 81 n.12.

141. *Id.* at 82-83 nn.17-19. The states where the veto was declared unconstitutional are Alaska, New Hampshire, and West Virginia. See e.g., *A.L.I.F.E. Voluntary*, 606 P.2d 769; Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981); *State v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

142. Levinson, *supra* note 137, at 84. The states which rejected the two-house veto amendment are Alaska, Florida, Missouri, and Texas.

143. *Id.* at 82.

144. *Id.* at 82 n.15.

145. *Id.* at 84-85 & n.16.

146. *Id.* at 83.

147. *Restoring the Balance*, *supra* note 131, at 11.

that the committee may take a too subjective view of legislative intent.¹⁴⁸ Since the committee members were involved in passing the legislation and indeed may have opposed its passage, their desire to further their own views could influence their interpretations of agency action. If the committee has an excessive number of regulations, the review task may interfere with its regular committee work.

The advantage of the joint committee approach is that the committee's primary function is regulatory review.¹⁴⁹ A larger bicameral committee is perhaps more likely to reflect the whole legislature's view on questions of legislative intent. A disadvantage is that committee members may have limited knowledge in the area being reviewed. There is also a cost factor in creating a special purpose committee that must be considered.

The hybrid approach using standing committees during the session and a joint committee during the interim combines the advantages of both of the other systems. The disadvantage is that the review function is split and this may cause a lack of cohesive legislative action.¹⁵⁰

After considering these alternative regulation review structures, the National Conference of State Legislature's Committee on Legislative Improvement recommended that a single joint committee, empowered to meet year around, be designated to perform the rules review function.¹⁵¹ Minnesota should retain its current joint committee, and enhance its powers to exercise oversight with respect to both proposed and existing rules. The LCRAR should be renamed the Legislative Commission for Regulatory Review to emphasize its new broader powers and clarify its constitutional role.

Legislatures utilizing a joint committee have adopted a variety of approaches to legislative review rules. The remainder of this section first outlines the powers given to the joint committee by the Model State APA and then examines the review mechanisms of several states where legislative oversight of agencies has been active.

148. *Id.* at 11-12.

149. *See id.* at 12.

150. *Id.*

151. *Id.* at 13.

2. *Model State Administrative Procedure Act*

A brief overview of the relevant provisions of the Model State Administrative Procedure Act (Model State APA) provides a helpful framework for understanding several creative legislative checks on agency rulemaking.¹⁵² Section 3-203 of the Model State APA creates an "Administrative Rules Review Committee" consisting of three representatives and three senators.¹⁵³ The Committee must be bipartisan. This requirement is similar to those for the LCRAR in Minnesota.¹⁵⁴

Section 3-204 contains two innovative and significant legislative checks on agency rulemaking. The checks were included in the Model State APA in an effort to reach a fair compromise. On the one hand, are those who believe legislatures should be able to veto otherwise valid agency rules by means less than statutory. On the other hand, are those who oppose any legislative efforts to affect the validity of the rules by means other than the enactment of a statute.¹⁵⁵ Under section 3-204(d), the Committee is authorized to object to a rule that it considers "to be beyond the procedural or substantive authority delegated to the adopting agency."¹⁵⁶ Under this provision, the filing of such an objection shifts the burden of persuasion to the agency to establish that the "whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency."¹⁵⁷

This objection does not alter the legal effect of the rule as does a veto or the LCRAR's suspension and so satisfies the constitutional concerns raised by *Chadha*. What it means is that the agency must convince the court that the rule is lawful in subsequent litigation where the rule's validity is in issue. This is obviously a limited check on agency behavior since it requires someone both affected by the agency rule and able to afford the litigation to initiate a lawsuit challenging the agency behavior. Of course the legislature may always enact a statute amending or repealing the rule. By 1982, provisions similar to

152. *Id.* at 8. See generally Prince & Hamilton, *Rules and Rulemaking Under the 1981 Model State Administrative Procedure Act (MAPA)*, 2 MINN. STATE BAR ASS'N, AD. L. NEWS (June 1984).

153. MODEL STATE APA, *supra* note 89, § 3-203.

154. See MINN. STAT. § 14.39.

155. See Prince & Hamilton, *supra* note 152.

156. MODEL STATE APA, *supra* note 89, § 3-204(d).

157. *Id.* § 3-204 Commissioner's comment.

the Model State APA existed in Iowa, Montana, North Carolina, North Dakota, and Vermont.¹⁵⁸

The Model State APA also requires the agency issuing the rule to respond in writing to the Committee's objections.¹⁵⁹ In addition, the Model State APA requires publication of the objection adjacent to the rule in question in the State Register.¹⁶⁰ The comment following section 3-204 expresses the view that the committee-objection mechanism will make agencies more responsive to the intent of the legislature.¹⁶¹

The second legislative check provided for in section 3-204 is that the Committee may require an agency to publish notice of the Committee's recommendations as a proposed rule of the agency and to allow public participation in subsequent rulemaking proceedings.¹⁶² The agency, however, is not required to adopt the proposed rule; to do so would effectively give the Committee the entire legislative power and is therefore unconstitutional. This provision insures fully informed agency decision-making on the subject of a committee recommendation. It will also bring public pressure on the issue to bear on the agency.

The Committee also plays a role under the Model State APA in triggering a cost-benefit regulatory analysis of the rule. Section 3-105 of the Model State APA requires an agency to formulate and publish a detailed, structured cost-benefit, regulatory analysis with respect to a proposed rule if either the governor, a specified legislative committee, a political subdivision, an agency, or 300 persons signing one request, formally demand such a statement within twenty days of publication of the proposed rule.¹⁶³ A small but growing number of state Ad-

158. See *Legislative Review Update*, *supra* note 129.

159. MODEL STATE APA, *supra* note 89, § 3-204.

160. *Id.*

161. See *id.*, Commissioner's comment. The comment states:

[T]he committee-objection mechanism proposed here may be justified, . . . on the ground that its mere existence is likely to make agencies act more responsibly in exercising their rule-making powers; for they will know that the shift in the burden of persuasion after a committee objection will, in close cases, make judicial invalidation of the rule much more likely than at present. Actual exercise of its objection authority by a legislative committee will also have the added benefit of inducing agencies which have issued rules of doubtful or clear illegality to withdraw them, thereby sparing the public the cost of complying with those rules or contesting them in the courts.

Id.

162. *Id.* § 3-204(e).

163. *Id.* § 3-105.

ministrative Procedure Acts (APA) currently contain a reference to such analyses.¹⁶⁴ In section 14.115, Minnesota's APA requires the consideration of regulatory alternatives which may reduce the impact of a rule on small business.¹⁶⁵ Sections 14.11, 14.131, and 3.982 require an estimate of additional costs imposed by any new rule on local units of government.

The comment to section 3-105 notes that regulatory analysis is an important device with which to assure sound agency consideration of a rule.¹⁶⁶ It is also a useful device to provide the public with a full description of a rule's potential advantages and disadvantages so that the public has full information on which to base its support or opposition to the rules. There are also several disadvantages to this type of cost-benefit analysis. The cost can become burdensome because of the large potential for disagreement about the accuracy of its contents. Regulatory analysis may be subject to abuse by parties seeking delay. The comments to the Act suggest that only politically responsible state officials like the governor or the legislative rules review committee be authorized to trigger this requirement.¹⁶⁷

3. *Sunset Requirements*

An increasingly popular method of state legislative control is the sunset requirement.¹⁶⁸ Sunset requirements provide for the expiration of rules at a predetermined date.¹⁶⁹ The intent is to require periodic review of all rules. One extreme approach to sunset is Colorado's legislation which provides that all new rules which go into effect after January 1, 1978, expire automatically on June 1 of the following year unless the legislature acts by bill to postpone the expiration date.¹⁷⁰ Under the statutory scheme, all existing rules will expire within a four-year period, creating excessive legislation to merely keep agen-

164. See *infra* notes 259-68 and accompanying text.

165. MINN. STAT. § 14.115, subd. 2 (1984).

166. MODEL STATE APA, *supra* note 89, § 3-105 Commissioner's comment.

167. *Id.*

168. See *Restoring the Balance*, *supra* note 131, at 8. The 1978 report of the National Conference of State Legislatures points out that several states have imposed sunset requirements on all rules. One commentator suggested that sunset is the most common and longest standing form of state regulatory oversight.

169. See, e.g., COLO. REV. STAT. § 24-34-104 (1973).

170. Comment, *State Regulatory Development and Reform: An Overview*, 1985 ARIZ. ST. L.J. 284.

cies effective.¹⁷¹ The legislature enacts bills at each session to continue the rules which are scheduled to expire.¹⁷²

The problem with Colorado's sunset provision is that a part-time legislature by definition has limited time and expertise which causes the delegation in the first instance. Requiring statutory enactment of all rules within a year of promulgation is not a practical means of control if state government is to continue addressing a wide variety of regulatory problems. Maine's sunset calling for the expiration of all rules five years after their adoption demonstrates the unmanageability of this type of control.¹⁷³ This process requires a continuing commitment of resources to rulemaking proceedings as agencies seek to promulgate rules every five years. This seems overly inclusive.

Most states have been unable to estimate cost savings as a result of sunset.¹⁷⁴ Legislators have felt that the principal benefit of sunset has been increased legislative experience and interest in oversight work.¹⁷⁵ The substantial impact of industry and professional influence has seriously undermined sunset review as a mechanism for regulatory reform and resulted in modest benefits. On the other hand, sunset review requires a substantial amount of time and money. In some commentators' view, the benefits of sunset may not outweigh the costs.¹⁷⁶ The mechanism in the Model State APA, whereby a legislative rules review commission can direct rulemaking proceedings on specified rules, is more efficient.¹⁷⁷

An analysis of various states' review mechanisms shows that there are not only a variety of approaches to the problem, but varying levels of activity.¹⁷⁸ In some states, the reviewing body is quite active; in others it is much less active.¹⁷⁹ Obviously,

171. *Id.* at 285.

172. *See* COLO. REV. STAT. § 24-34-104.

173. 1964 ME. LAWS 3 §§ 506, 507.

174. Rose, *The Arizona Sunset Experience: The First Two Cycles*, 1985 ARIZ. ST. L.J. 321, 413.

175. *Id.*

176. *Id.* at 415-18.

177. *See generally*, MODEL STATE APA, *supra* note 89.

178. *See* Letter from Mark Shepard, Legislative Analyst, to Neil Hamilton (Aug. 13, 1985) (discussing legislative commissions active in rulemaking process in Florida, Illinois, and Iowa (on file at William Mitchell Law Review office) [hereinafter cited as Shepard Letter, Aug. 13].

179. It is useful to examine the review mechanisms and their use in several states which have legislative rule review committees. In Florida, Illinois, and Iowa, the leg-

not only the review system itself but the resources devoted to

islative commissions are fairly active in reviewing rulemaking. The data presented were gathered by Minnesota House research staff in telephone interviews with joint committee staff in the various states. Data indicating the actual operation of these committees is more useful than a theoretical review of each state's statutes.

In Florida, the staff of the administrative procedures committee reviews each proposed rule. Shepard Letter, Aug. 13. They examine approximately 5,000 rules per year. *Id.* The goal of the staff is to complete the examination of each rule prior to its effective date.

Most technical and substantive changes made to proposed rules occur at the staff level. These changes are negotiated by committee and agency staff. *Id.* The staff's ability to recommend a formal objection to the committee tends to encourage agencies to confer and compromise. During 1985, in reviewing over 2,000 rules, only 15 rule objections have been made. *Id.*

Ultimately, if the agency refuses to amend or rescind a proposed rule, the committee, in cooperation with the governor, has the statutory authority to go to court to challenge an agency's position. *Id.* This has not been done as of yet.

If additional work on a proposed rule is required, an agency can extend the effective date of that rule one time for a maximum period of 60 days. *Id.* This occurs approximately ten times per year. Once a rule becomes effective, the committee is precluded from suspending the rule.

Anyone who believes he is harmed by a rule may file a petition for an administrative hearing. The filing of the petition suspends the rulemaking process until the hearing and any appeals to the courts are terminated. A two year time frame for such actions is not unusual. *Id.*

In Illinois, the joint committee on administrative rules has statutory power to object to any proposed agency rule. *Id.* If the agency refuses to modify or withdraw the official rules, the rulemaking process proceeds and the committee's objection is published along with the promulgated rules. *Id.* The committee can prevent the agency from proceeding with a proposed rulemaking for 180 days during which time the committee must introduce a joint resolution which, if approved, permanently prohibits the agency from proceeding with that rulemaking. *Id.*

In 1984, the Illinois joint committee examined 604 proposed rules. *Id.* A total of 295 statements of objection were issued. *Id.* The proportionately large number of agency refusals to respond stems from a recognition of the committee's limited powers. The joint committee has used its power to postpone a rulemaking proceeding only twice in its history. *Id.* The response to the postponement is unrecorded.

In Iowa, the legislative administrative rules review committee and the governor each have one lawyer with a secretary serving as staff. *Id.* The administrative rules review committee has the power to object to rules and shift the burden of proof on the question of legality to the agency in judicial proceedings challenging the rule. *Id.* Committee objections are rare and average approximately 3-4 per year. *Id.* What problems exist are worked out through negotiations at the staff level. Often an agency will withdraw a proposed rule before it is sent to the legislature by committee. Although both the attorney general and the governor also have the power to object to proposed rules, in fact they never do. The attorney general is faced with a conflict of interest because it is that office that helps agencies draft their proposed rules. The governor prefers to use veto power and does so occasionally (eight to ten vetoes have been issued by the governor's office since 1978). *Id.* Political expediency dictates that agencies avoid proposing rules to which the governor will object.

Upon objection by the committee, an agency will revise or drop a rule or somehow accommodate the committee 50 percent of the time. *Id.* Agencies recognize

its functioning and the diligence with which the review task is performed all affect the ultimate oversight result.

V. EXECUTIVE CONTROL MECHANISMS

The executive branches of the federal government and also several states have introduced oversight mechanisms to control agency regulations. Many of these control measures could also be implemented by the Minnesota Legislature. For example, the Congressional Budget Office (CBO) mirrors the Office

that an objection will impede a rule only if the rule is brought to court this situation, however, happens infrequently. As a threat, the objection is moderately successful.

An objection by the committee will shift the burden of proof in litigation regarding the validity of the rule. The Iowa Supreme Court has adjudicated three such objections. *Id.* In a 1978 decision, the Iowa Supreme Court upheld the committee's objections. *Schmitt v. Iowa Dept. of Social Serv.*, 263 N.W.2d 739 (1978). In 1981-82, the court found the rule lawful in spite of the committee's objections. *Id.* In 1983, the court overturned the rule on other grounds. *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 334 N.W.2d 748 (1983).

A number of additional state processes were examined in less detail by the Minnesota House Research Department. In Connecticut, the regulation review committee has authority to review all proposed regulations and to approve or disapprove them. *See* Letter from Mark Shepard, Legislative Analyst, to Neil Hamilton (Aug. 27, 1985) (on file at the William Mitchell Law Review office) (discussing legislative oversight in Connecticut, North Carolina, North Dakota, and Vermont). This power is granted to the committee in the state constitution as earlier noted, so there is no doubt about its authority to reject regulations. *Id.* When the committee rejects a proposed regulation it must send notice of this rejection to the full legislature, which has the authority to overturn the committee's decision. However, the decision of the committee stands unless overturned by the legislature.

The committee can take two types of negative action on proposed regulations. First, it can "reject" without prejudice. *Id.* Second, it has the power to "disapprove" proposed regulations. If a regulation is disapproved, it cannot be implemented or resubmitted to the committee, but can only become effective if the full legislature reverses the committee. *Id.* The committee has the power to reject or disapprove any portion of a proposed regulation, but cannot add any words to a proposal. *Id.*

In Montana, the Administrative Code Committee has authority to review all proposed rules and to make recommendations to the legislature. *Id.* The committee also has authority similar to that in the 1981 Model Act to formally object to rules and to shift the burden of proof in a court case to the agency. *Id.*

North Dakota has a process similar to that under the Model Act, under which the rules review committee can object to a rule and thus change the burden of proof in court. *Id.* However in North Dakota the committee's review takes place *after* the rules are adopted whereas in the Model Act, the committee may review and object to possible, proposed or adopted rules. *Id.* The committee has not been very active in recent times.

Vermont has a system similar to the Model Act, under which an objection by the rules review committee shifts the burden of proof in a court challenge to the agency. *Id.* The committee has objected to proposed rules ten times in four or five years. *Id.* There has been only one court case involving these ten sets of rules, and in that case, the court ruled in favor of the agency.

of Management and Budget (OMB) in terms of budgetary analysis. There is no reason that the CBO could not also mirror the regulatory oversight powers of the OMB. The LCRAR could also be so designed. An analysis of the executive branch efforts is therefore instructive in the consideration of options for legislative oversight.

A. Federal Executive Control

A well-recognized executive control mechanism is the requirement that agencies conduct a regulatory analysis of a proposed regulation.¹⁸⁰ Regulatory analysis has become a catch word for executive policymaking at the federal level. It serves several purposes: regulatory relief in response to political pressure for less regulation; bureaucratic accountability; and more rational decision making.¹⁸¹

1. Executive Order 12,291

The current Executive Order requiring agencies to prepare an economic analysis of the impact the regulation will have is No. 12,291 issued by President Reagan in 1981.¹⁸² The order requires each executive agency to file a preliminary Regulatory Impact Analysis (RIA) prior to the notice of proposed rulemaking and a final RIA prior to the publication of the rule with the OMB.¹⁸³ A RIA must be filed for each "major" rule that is proposed.¹⁸⁴ A "major" rule is one anticipated to have an annual impact on the economy in excess of \$100 million.¹⁸⁵ The RIA must describe "the potential costs and benefits of the rule, their incidence, and alternative approaches that might achieve the same goals at lower cost."¹⁸⁶ The RIA's must be published in the *Federal Register* along with legal and factual support for

180. See generally A.B.A. SECTION ON ADMINISTRATIVE LAW REPORT TO THE HOUSE OF DELEGATES (July 1985) [hereinafter cited as A.B.A. REPORT].

181. Every President since the 1970's has issued some type of Executive Order making such a requirement. President Ford issued Exec. Order No. 11,821, 3 C.F.R. 161 (1977). In 1979, President Carter issued Executive Order No. 12,044, C.F.R. 152 (1979).

182. Exec. Order No. 12,291, 3 C.F.R. 129 (1982).

183. *Id.*

184. *Id.*

185. *Id.*

186. See Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 292.

the rule.¹⁸⁷

The executive agencies are directed by section two of the order to adhere to several requirements. To the extent permitted by law, regulatory action shall not be undertaken unless the predicted potential benefits for the regulation outweigh the potential cost to society. Additionally, among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen.¹⁸⁸

The order also provides for enforcement by the OMB.¹⁸⁹ The OMB may return a preliminary regulatory analysis for further study when it finds an agency's analysis inadequate. Since there are no prescribed definitions of benefits and costs in the order, the OMB has considerable discretion to delay rulemaking proceedings. If a final RIA is not approved, the agency is explicitly authorized to go forward, merely explaining its differences with the OMB.¹⁹⁰ In reality, since the President has the power to dismiss any agency head ignoring his wishes, the advice of the OMB with respect to a proposed or final rule is rarely if ever ignored.

The OMB has been very active in the realm of administrative review since the early 1980's.¹⁹¹ In addition to reviewing rules under the procedures set out in Executive Order 12,921, the OMB solicits information from outside sources. More specifically, the OMB has asked the affected industry to review a proposed rule and to offer comments.¹⁹² The OMB admits that it meets with "groups," but does not keep records of these meetings.¹⁹³ The OMB's written comments on rules are published, but its information gathering meetings are not.¹⁹⁴

These practices have led to considerable criticism of the role

187. See Exec. Order No. 12,291, 3 C.F.R. at 130.

188. See *id.* at 129.

189. Raven-Hansen, *supra* note 187, at 294.

190. *Id.*

191. A recent article in the Wall Street Journal, indicated that after the Supreme Court's decision in *Chadha*, the Office of Management and Budget will become the chief regulatory oversight body. Palmer, *Special Interests Train their Sights on OMB*, Wall St. J., Aug. 2, 1985, at 12, col. 4.

192. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES LAW 1, 56 (1984). The OMB, at a hearing on the role of OMB in rulemaking, provided a list of 36 meetings over a two-month period. All but three meetings were with industry representatives. *Id.* at 57.

193. See *id.* at 59 (OMB vehemently opposes recording oral contacts).

194. *Id.*

the OMB is playing in regulatory oversight. The secrecy with which it may be exercising decisive power over the content of rules circumvents the Administrative Procedure Act emphasis on public participation and open government. The OMB has taken steps to dispel the criticisms that its practices enhance industry positions. Guidelines were issued stating: "OMB will regularly advise those members of the public with whom they (OMB) communicate that relevant factual materials submitted to the (OMB) should also be sent to the agency for inclusion in the rulemaking record."¹⁹⁵ The guidelines, however, did not require any official docketing of OMB contacts.

The OMB also stated that only top officials within the office were to have contacts with industry. The problem is that this rule is not followed.¹⁹⁶ The staff is allowed to discuss "paperwork" requirements and to review written materials it receives from interested parties. The OMB states that it publishes all materials it receives from interested parties. However, no such official docket is found.¹⁹⁷

2. Executive Order 12,498

Executive Order 12,291 has been complemented by Executive Order 12,498 effective January 4, 1985.¹⁹⁸ This order es-

195. *Id.* at 62 (quoting David A. Stockman, Director, OMB, Certain Communications Pursuant to Executive Order 12,291, 'Federal Regulation' (memorandum M-81-9) (June 11, 1981), *reprinted in* HEARINGS 988-89).

196. *Id.* at 63.

197. *Id.* at 64.

198. 1985 U.S. CODE CONG. & AD. NEWS at B15. The Council of the Administrative Law Section of the American Bar Association has basically endorsed these executive orders with some suggested reforms. The Council adopted several resolutions. First, Executive Orders 12,291 and 12,498 are appropriate exercises of executive authority to promote presidential involvement in rulemaking activities of federal agencies. Second, the Executive Orders should be extended to independent agencies. Third, oversight by the OMB should recognize,

"(a) the placement of substantive decisional responsibility in the agencies; (b) the principle of procedural regularity; (c) the executive's general obligation to enforce the law as it has been enacted by Congress; (d) the role of Congress in any political process for the oversight of rulemaking activity; and (e) the value of opening the rulemaking process to public scrutiny and review." Fourth, oversight should "seek to shape the course of agency policymaking." The oversight process is most appropriate in setting agency priorities, coordinating several agencies, and expressing presidential policy. Fifth, the OMB should strive to keep records of OMB communications. Furthermore, those communications should be made available to the public. Finally, agency reports to OMB should be made available to congressional committees.

A.B.A. REPORT, *supra* note 180.

establishes a regulatory planning process by which the Administration will develop and publish a regulatory program for each year. Each agency which is subject to review under 12,291 must submit to the OMB "a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned" ¹⁹⁹ The director of the OMB is authorized to review the draft program for consistency with the Administration's policy. ²⁰⁰

The order requires that if an agency proposes to take a significant regulatory action not included in or materially different from the final regulatory plan, the agency must submit the action to the OMB for review. ²⁰¹ The first report outlining the major initiatives of seventeen federal agencies was published in August of 1985. ²⁰²

In addition to criticism of OMB's secrecy with respect to the input it receives, another criticism of the regulatory analysis of the OMB is that it infringes upon fairness values. ²⁰³ There are also political drawbacks in that the agency can experience "demoralization" at being reviewed and overruled by agents of the President. Legislators no longer give unbridled deference to agencies because of the agency's "expertise" in a regulated field. ²⁰⁴

A more tangible problem of regulatory analysis is the cost involved. ²⁰⁵ If the analyses are saving the public more than the cost of producing such reports, then the purpose of 12,291 is being served. ²⁰⁶ Despite the drawbacks involved, regulatory analysis is receiving acceptance by administrative

199. 1985 U.S. CODE CONG. & AD. NEWS at B16.

200. *Id.*

201. *Id.*

202. REGULATORY PROGRAM OF THE U.S. GOV'T, APRIL 1, 1985 - MARCH 31, 1986, EXECUTIVE OFFICE OF THE MANAGEMENT AND BUDGET (Aug. 8, 1985).

203. PIERCE, *supra* note 7, § 9.5.1. "When the executive attempts to assert further control over the agencies to make their policies more reflective of the President's goals, the executive is bound to upset existing relationships between agencies and their constituencies and, in some cases, between agencies and Congress." *Id.*

204. *Analysis of OMB Oversight Role Misunderstood*, Legal Times, May 27, 1985, at 13 col. 1. "The notion of deference to agency 'expertise' is no longer fashionable or justified, but there may be some merit still to reliance upon experienced officials with proximity to the regulatory problems." *Id.*

205. *Id.* "But this only suggests that regulatory analysis is itself a technique that ought to be controlled by principles of cost-benefit analysis." *Id.*

206. *Id.*

organizations.²⁰⁷

The regulatory planning process, initiated by Executive Order 12,498 in January 1985, may be laying the groundwork for the adoption of a regulatory budget.²⁰⁸ A regulatory budget addresses the unique problem that regulatory compliance costs, unlike the costs of government paid for by direct governmental expenditure, are unconstrained by systematic mechanisms of public finance such as annual budgeting, appropriation, and taxation. A budgeting process applicable to regulatory costs would be most useful in coordinating and controlling these regulatory costs.

The construction of a shadow budget to cover the resources which an agency requires private persons to consume in the pursuit of a regulatory goal would confront regulators with the cost of their actions. A central office, such as the OMB at the federal level, would have to administer such a system. The legislature could, however, specify the size of the regulatory budget for each agency or even each program. The function of each administrative agency would then be to maximize the benefit of its regulation subject to this limitation. These costs would be publicized and would be more visible to the public, which would be less likely to assume that the costs of regulation are minimal.

The development of such a budget proposal at the state level would require a process analogous to the conventional fiscal process. The budget proposed would have to be developed in negotiation with the governor and the regulatory agencies and submitted to the legislature for approval.

Since the regulatory budget would not be allocating actual government revenue, but rather, authority over private revenues, problems arise in measuring the private regulatory costs on an estimated basis when the regulations are first issued and

207. The ABA Section of Administrative Law endorses these executive orders as sound policy to ensure both coordination of regulatory activity and greater political accountability for regulation. A.B.A. REP., *supra* note 180, at 10-12. The Administrative Conference of the United States endorsed regulatory analysis of rules generally. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 85-2, 1 C.F.R. § 305.85-2. Both bodies call for procedures to increase public disclosure of materials and contacts influencing policy decisions. See generally DeMuth, *The Regulatory Budget*, REGULATION 29 (March/April 1980) (examination of regulatory cost constraints).

208. PIERCE, *supra* note 7, § 9.5.3; see generally Regulatory Flexibility Act, 5 U.S.C. §§ 602-12 (1982).

on an actual basis after the regulations have been in effect for some time period. There will be wide disagreement on how to measure these costs. A possible solution is to commit several years of effort on an experimental basis with some programs to develop a uniform methodology of cost measurement. Some oversight agency will have to verify the accuracy of both agency and regulated firm cost estimates.

There will also be a problem in the determination of the overall budget constraint since the budgeting exercise is not constrained by tax revenues or debt limitations. The process of arriving at a budget will, however, force political officials to consider and publicize regulatory costs taken as a whole.

The regulatory budget is an innovative concept which the Minnesota Legislature should consider. Given, however, the complexity of the calculations (which would be more complex than those called for by regulatory impact analysis) and the expense of developing proper methodologies, the legislature should wait for the federal government to implement the concept and then build on that experience.

3. *Regulatory Flexibility Act*

Whereas the regulatory agenda and cost benefit analysis have been imposed by executive order, the only statutorily-created requirement for regulatory analysis of general applicability at the federal level is the requirement of a regulatory flexibility agenda and a regulatory flexibility analysis.²⁰⁹ Each agency must transmit a regulatory flexibility agenda during the months of October and April each year to the Chief Counsel for Advocacy of the Small Business Administration.²¹⁰ Under the Regulatory Flexibility Act, an agency is required to publish a regulatory flexibility agenda (RFA) in the *Federal Register*.²¹¹ The agenda must include the following: (1) a brief description of the subject areas of any proposed rule which is likely to have a "significant economic impact on a substantial number" of small businesses; (2) a summary of any rule including the objectives and legal basis of the rule and a schedule for action on the rule; and (3) the name and telephone number of an

209. 5 U.S.C. § 602(a) (1985).

210. *Id.*

211. *Id.*

agency official who is knowledgeable on the rule.²¹²

Whenever an agency is engaged in rulemaking, it must prepare and make available an initial regulatory flexibility analysis which shall describe the impact of the proposed rule on small entities. The analysis should contain a description of any significant alternatives which accomplish the objectives and which minimize economic impact of the proposed rule on small entities. This analysis or a summary thereof is to be published in the *Federal Register* and a copy transmitted to the Chief Counsel for Advocacy of the Small Business Administration. When an agency promulgates a rule, a final regulatory flexibility analysis is also required indicating the need for the rule, a summary of the issues caused by public comments on the initial flexibility analysis, and the agency's responses, and a statement of reasons why significant alternatives with less significant impact on small entities were rejected.²¹³

B. State Executive Control

Some states have been following the lead of the federal government and have placed increased control in the hands of the executive branch. The first state to provide comprehensive executive oversight was California. In California, an executive branch agency ensures that agencies follow appropriate rulemaking procedures and reviews and approves all rules for clarity, authority, consistency, reference, and necessity. The latter three elements for review are not self-explanatory. "Consistency" requires that the rule does not conflict with an existing law.²¹⁴ "Reference" requires an agency affirmatively

212. *Id.*

213. *Id.*

214. CAL. GOV'T CODE § 11349(d) (1980). "Consistency" requires that the rule does not conflict with an existing law. See also Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 246.

The California reform was proposed as a compromise between two goals of reducing the number of regulations and improving on pre-existing regulations. *Id.* at 247.

Professor Cohen states that:

To be theoretically sound, procedural reform should enable collection and analysis of important factual information and also direct public and agency attention to the critical policy decisions that must be resolved in making regulatory choices. Procedural reforms should achieve these purposes without burdening agencies with paper shuffling tasks that add to neither the soundness of regulatory choices nor the accessibility of the regulatory process to the public.

to demonstrate where it receives authorization to promulgate the rule.²¹⁵ "Necessity" is shown when the record of the rulemaking contains "substantial evidence supporting the agency's determination that the regulatory provision is necessary," but not when the agency relies on only speculation or opinions which are unsupported by facts.²¹⁶ The California approach is similar to the requirement in Minnesota that agencies carry an affirmative burden to demonstrate the need for and reasonableness of rules. The requirement is discussed in the next section of this Article.

Arizona soon followed California establishing an executive body to review all administrative rules before they are promulgated. In Arizona, all agencies must submit an economic impact statement and cost benefit analysis on each rule to the Governor's Regulatory Review Council.²¹⁷ The Council re-

Id.

The requirements of the California plan are administered by the Office of Administrative Law (OAL). *Id.* at 234. To increase accountability in the agency rulemaking process, "[e]very agency shall maintain a file of each rulemaking which shall be deemed to be the record for that rulemaking proceeding." Art. 6, § 160, Proposed Regulations, Office of Admin. Law 82 Cal. Admin. Reg., No. 22-2 (May 29, 1982). Rules must also be clearly written. Cohen, *supra*, at 244.

In addition to its power to review all new rules, the OAL was empowered to review all existing regulations. CAL. GOV'T CODE § 11347.3. If rules are not approved, the agency may rewrite the rule, appeal the decision to the Governor, or try to negotiate a compromise with the OAL.

One criticism of the plan is the increase in paperwork as a result of the filing requirements of reasons and comments. The requirement that the agency respond to all comments instead of only "primary considerations" seems overly intrusive.

The strong and weak points of the California OAL review process are summed up by Professor Cohen. "The OAL review process works well to control the procedural aspects of rulemaking. It is less successful as a control over the substantive aspects of regulatory adoptions because the process fosters substitution of judgment and inadequately considers agency expertise." Cohen, *supra*, at 281.

215. CAL. GOV'T CODE § 11349(a). The OAL approval shows that the agency has met several substantive requirements of "authority to promulgate" a rule. The statute requires that there is a "provision of law" which authorizes or requires an agency to promulgate a rule. *Id.* To achieve this, the rule must be reviewed for consistency with and reference to existing law.

216. CAL. GOV'T. CODE § 11349(b). The most difficult task for the agency is to show that the rule is "necessary."

The criteria established to determine necessity are ambiguous, at best. "Deliberate ambiguity may have been critical to legislative acceptability, but it causes serious administrative difficulty." Cohen, *supra* note 214, at 266. The indication is that the legislature intended the "reasonably necessary" standard of the APA to continue.

217. In Arizona, the review process is exercised by two separate executive bodies. First, there is a Governor's Regulatory Review Council. This Council reviews all proposed rules. Second, all final rules must be reviewed and certified by the Attorney

views the cost benefit analysis to determine if the public interest is served by the rule. The Council also reviews the rule for clarity. The Council may approve, amend, or reject a rule.²¹⁸

Under the 1981 Model State APA, the governor may veto all or a portion of any rule, or terminate any rulemaking proceeding at any time.²¹⁹ The governor must only state reasons when terminating an ongoing rulemaking proceeding. When vetoing an adopted rule, however, the governor's executive order is subject to the rulemaking procedures set forth in the Model State APA.²²⁰ The scheme of executive review of rules is intended to facilitate coordination of all state agency policymaking by the directly elected chief executive of the state. In contrast to the unconstitutional schemes for legislative veto this review is a constitutional means of securing a direct political check on lawful rules that are unacceptable to the community.²²¹ Statutes or executive orders in at least five states, beside California and Arizona, provide for some form of executive veto of agency rulemaking.²²²

General's office. Note, *State Regulatory Development and Reform: An Overview*, 1985 ARIZ. ST. L.J. 261, 315.

The Governor's Regulatory Review Council was created by Executive Order 81-3 issued by Governor Babbitt. Executive agencies must submit an economic impact analysis to the Council.

218. Pursuant to the Arizona Administrative Procedure Act, all rules must be certified by the Attorney General. ARIZ. REV. STAT. ANN. § 41-1002.01 (Supp. 1984-85). The Attorney General's review encompasses the power to review for appropriate format; to determine if there is statutory authority, and if legislative purpose is served. This procedure has resulted in extensive attorney general involvement in the rulemaking process, often before the notice and comment period has begun.

After notice and comment, the agency submits the rule to the Attorney General. The rule is accompanied by a letter which sets out the basis of rulemaking authority. Negotiation is an important part of the rulemaking process. Formal rejection rarely occurs. Effective review occurs because "[p]roposed rules are reviewed for legality and form by the Attorney General and for clarity and impact by the Governor's Regulatory Review Council. In addition, the agencies themselves are reviewed by the Legislature under the sunset law." Note, *supra* note 217, at 318-19.

219. MODEL STATE APA, *supra* note 89, § 3-202.

220. *Id.* § 3-202(a).

221. *Id.* § 3-202 comment.

222. At least seven states provide for some kind of executive veto of agency rulemaking. Bonfield, *supra* note 130, at 110. Statutes or executive orders in at least 18 states create some form of executive oversight over agency rulemaking. Falk, *State Regulatory Development and Reform: An Overview*, 1985 ARIZ. L.J. 261, 298. In 10 of these states, the governor has some form of executive veto on rules. *Id.* at 298-300. In four of these states, the executive participates in review of rules within the framework of the legislative oversight system. The governor's review can occur under a

V. RECOMMENDATIONS

Sections III and IV have presented an inventory of the legislative and executive oversight mechanisms from which the Minnesota Legislature might choose in enhancing its own capability to monitor the regulatory agencies. Because the interest in legislative and executive oversight of agencies, particularly at the state level, is new in its present dimensions, and the problem of legislative control has been made more difficult by the *Chadha* decision, there is no consensus concerning the most effective legislative control mechanism. Stepping back to look at basic objectives against which to measure the options may clarify the choices. What criteria should be used to make a principled selection of a particular oversight mechanism? The following discussion sets out several straightforward legislative objectives useful in analyzing legislative oversight options, and then makes some recommendations that will achieve those objectives.

A. *Objectives of Legislative Oversight*

Underlying any legislative control are the objectives discussed in section II that the legislature limit itself to addressing serious market defects, that it select the least intrusive regulatory solution, and that it articulate well defined delegations. Each substantive area of regulation should be thoroughly reviewed every several years to ask again whether conditions calling for regulation may have changed, whether the legislature has matched the regulatory problem with the least intrusive regulatory tools necessary to solve it, and whether there are adequate incentives for the minimization of bureaucratic and provider costs.

There are three principal objectives which the legislature seeks to achieve through legislative oversight: (1) the legislative control mechanism must prevent an agency from exceeding its statutory authority or violating legislative intent; (2) the legislative control mechanism must ensure, in so far as possible, that the agency engages in reasoned decision making; and (3) the legislative control mechanism should address the problem of the lack of overall coordination among the agencies.

defined set of guidelines in conjunction with the legislative review committee. *Id.* at 299-300.

While each single-mission agency will pursue its mandate with diligence, the aggregation of rules across all the agencies demonstrates both a lack of coordination among regulations and a total regulation that may be extremely burdensome. The legislature should be in a position to consider the whole scheme of regulation.

What legislative oversight mechanisms will assist in achieving the first objective of preventing an agency from exceeding its statutory authority or violating the legislative intent? The discussion in section II demonstrates the serious Constitutional issues posed by the LCRAR's current power to suspend rules. An effort could be made to amend the Minnesota Constitution to allow for committee veto or suspension power, but this approach used alone may not provide the considered legislative oversight desired. Furthermore, efforts to amend the Constitution to this end have failed recently in a number of states.²²³

The LCRAR's powers to investigate complaints and negotiate with agencies concerning complaints are effective, yet the legislature wishes to have a more significant check. What, beyond purely the authority to recommend, can the legislature give to its rules review committee to achieve this first objective?

In order to guard against excessive or duplicative grants of regulatory power to the agencies, both houses of the legislature could adopt a rule requiring that all bills containing any new grant of agency regulatory authority be sent to a single committee for an assessment of how that authority alters the existing regulatory landscape. The LCRAR would be an appropriate committee. In its review of existing rules, the LCRAR is in a good position to assess the existing regulatory authority over a subject matter and question the need for additional authority. Use of a joint committee for this task would have the benefit of coordinating House and Senate efforts at new regulation. This committee's jurisdiction might be limited to simply identifying instances where it perceives a proposed grant of authority as duplicative²²⁴ or excessive in the sense that the proposed language is either vague or broader than necessary to achieve the desired aim. The LCRAR could then

223. Levinson, *supra* note 137, at 84.

224. For example, two agencies may be attempting to regulate the same area.

transmit these concerns to the appropriate committees in each house for their further consideration, but the LCRAR would not have jurisdiction to amend the bills reviewed. This task would have to be fitted into the timetable for processing legislation through each house, but of course, not all bills would be affected. The authors are unaware of any processes, either in Congress or at the state level, designed to achieve precisely this goal.²²⁵

B. Model State Administrative Procedure Act

The 1981 Model State Administrative Procedure Act (Model State APA) provides the legislative rules review committee with more than the authority to recommend, and scholars believe these powers are constitutional.²²⁶ As discussed earlier in this Article, section 3-204 of the Model State APA contains two innovative and significant checks on agency rulemaking. Under section 3-204(d), the Rules Review Committee is authorized to object to a rule that it considers "to be beyond the procedural or substantive authority delegated to the adopting agency."²²⁷ The effect of the filing of such an objection is to shift the burden of persuasion to the agency to establish that the "whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency."²²⁸ In subsequent litigation, the agency must convince the court that the rule is lawful.

This practice differs from the ordinary procedure in which the burden is on those who challenge the legality of a rule to convince the court it is unlawful.²²⁹ The Model State APA also requires the agency issuing the rule to respond in writing to the Committee's objections. In addition, the Model State APA

225. See generally *Restoring the Balance*, *supra* note 131 (state by state review of administrative oversight mechanisms); *Legislative Review Update*, *supra* note 129 (update of the earlier National Conference of State Legislatures report).

226. See generally BONFIELD, *Rulemaking Under the 1981 Model State Administrative Procedures Act: An Opportunity Well Used*, 35 AD. L. REV. 77 (1983).

227. MODEL STATE APA, *supra* note 89, § 3-204. See *Restoring the Balance*, *supra* note 131, at 10. The National Conference of State Legislatures has, however, specifically recommended that all bills granting rule-making authority to an agency be reviewed in a process designed to assure that legislative intent is clear and that adequate standards are provided to guide agency rulemaking.

228. MODEL STATE APA, *supra* note 89, § 3-204(d)(5).

229. See Shepard Letter, Aug. 13, *supra* note 180.

requires notice of the objection adjacent to the rule in question in the state register.

Provisions which give the committee power to challenge the agency's rule in court are of dubious value.²³⁰ If an agency's rules are illegal in the sense that they are unconstitutional or beyond the scope of the agency's rulemaking power, others have standing to challenge the agency action on those grounds. If this is all the committee's authority to sue represents, then that authority is, in effect, simply a special standing provision. If the problem is that the agency's rules are not illegal, but instead, are unwise in the committee's view, no court should rule on such a political question. If the agency action is in fact unwise in the sense that it is politically unacceptable to the legislature, the legislative judgment can and should be reflected in a statute overturning or modifying the agency action. Such a statute reflects the whole legislature's rather than merely the committee's consensus on the issue raised.

The second legislative check provided for in section 3-204 of the Model State APA is that the Committee may require an agency to publish notice of the Committee's recommendation as a proposed rule of the agency and to allow public participation thereon.²³¹ The agency, however, is not required to adopt the proposed rule. This provision insures fully informed agency decision making on the subject of a committee recommendation. It should also help focus some of the same political pressures that influence the legislative process on the agency decision-making process.

Given the constitutional limitations on legislative control of rulemaking after the rule has been promulgated, a very useful oversight improvement is to move away from review at this stage. Oversight mechanisms should provide an opportunity for legislative control at earlier stages of rulemaking. Congress has been applying report and wait provisions to a variety

230. By 1982, similar provisions existed in Iowa, Montana, North Carolina, North Dakota, and Vermont. See *Legislative Review Update*, *supra* note 129, at 3-8.

231. MODEL STATE APA, *supra* note 89, § 3-204(d). If the LCRAR directs an agency to proceed with rulemaking, the agency may not invest significant effort in carrying its affirmative burden to demonstrate the need for and reasonableness of the rule. Of course, the record in support of the need for and reasonableness of a rule will ultimately include comments from parties participating in the rulemaking. In any case, in many instances the LCRAR may be directing an agency to put one of the agency's informal guidelines or policies through rulemaking, and agency's motivation will be high.

of agencies, including the Consumer Product Safety Commission, the Nuclear Regulatory Commission, HUD, and ICC.²³²

Under these provisions, agency officials must notify Congress in advance of any notice of rulemaking and as a further step, consult directly with the standing committees. Agencies in Minnesota could be required to report rules to the LCRAR before they are proposed and then wait for a thirty or sixty day period for LCRAR or standing committee reaction. A "good cause" exception to the report and wait requirement should be available for instances where an agency is under a tight deadline imposed by statute or court order for issuing rules. The statute should be quite explicit in defining the limits of this narrow exception so as to leave little or no doubt as to when the agencies can escape the report and wait requirement.

These prior notice and consultation requirements do not permit legislative rejection of a proposed action, but they do provide an opportunity for legislative scrutiny and comment upon the rules to be proposed. Through advance notice and consultation, the legislature should be able to influence, modify, or even secure withdrawal of rules.

Mindful of both the criticisms of OMB review,²³³ and the concern that the committee's review be open to public scrutiny, it may be advisable that all lobbyist and other contacts with the committee made in connection with any rule review be docketed, perhaps in the State Register. This does not prevent the committee from responding to politically powerful private interests, but would make that influence evident to voters. The committee should be admonished to pursue a coherent, consistent regulatory policy, and to use its overview perspective to help the agencies set regulatory priorities. The committee should also coordinate regulatory priorities and coordinate the regulatory efforts of all agencies.²³⁴

This same concept of prior notification and consultation

232. See *supra* notes 94-97 and accompanying text; S. BREYER, *supra* note 14, at 351.

233. See *supra* notes 189-97 and accompanying text.

234. Other concerns expressed by some are that the review committee's staff may play too large a role in the review process. Also, affected interests will get two bites at the apple in the rulemaking process, one in the agency and one in the legislature. S. BREYER, *supra* note 14, at 357. Another concern is that certain key legislators on the review committee will gain too much influence over agency decisions on rules. See Comment, *Legislative Review of Agency Rules in Arizona: A Constitutional Analysis*, 1985

should be moved into the early stages of an agency's planning of its regulatory program. The legislature should have more involvement at the beginning of the policymaking process, rather than, as at present, having only a role in reviewing a proposal already formulated or even adopted. Since rulemaking is delegated legislation, the legislature should increase its role in the process of formulating this delegated legislation, giving itself access to, and ability to comment on, agency regulatory planning at earlier stages.

This earlier involvement in the process of policy development will help focus the legislature on its most valuable role of shaping the course of agency policymaking rather than reacting only to displace agency decisions in particular proceedings. The oversight process should help the legislature both define the overall priorities of government and coordinate the activities of the several agencies responsible for addressing broad problems from various perspectives.

C. Regulatory Planning Agenda

The legislature could borrow the concept of a regulatory planning process from Executive Order 12,498 issued January 4, 1985.²³⁵ That Order establishes a regulatory planning process to assure development and publication of an annual regulatory program. The Order requires the head of every

ARIZ. ST. L.J. 499. While there may be some basis for each of these concerns, the authors believe they do not outweigh the benefits of the reforms proposed.

As to the influence of committee staff and key legislators, that is a problem that may already exist with respect to the role played in the legislative process by standing committees. There is no more cause for concern about this influence in the rules review committee than in, for example, an appropriations committee, and to the extent that it may be a problem, it can be overcome by conscientious legislators. Unlike a veto on suspension power, the report-and-wait and regulatory impact analysis requirements do not empower the review committee to undo agency action. The committee's role is more advisory in nature, and this difference from the veto scenario should make the review process less susceptible to undue influence.

As to the "two bites" concern, it must be remembered that interested parties already lobby the legislature at the time consideration is being given to new agency rulemaking authority and then participate in the agency's rulemaking proceedings. The authors feel that the benefits of increased political accountability by the agencies are worth the added time and cost in the rulemaking process engendered by these proposals. Above all, is the fact that rulemaking is the exercise of delegated legislative power involving essentially political questions. Such decisions should be subject to all political influences in our open review process. See DAVIS, TREATISE ON ADMIN. LAW. § 6:40, at 151-53 (1972).

235. Exec. Order No. 12,498, 1985 U.S. CODE CONG. & AD. NEWS B15.

executive agency to submit to the OMB a "draft regulatory program" that includes a description of "all significant regulatory actions of the agency, planned or underway," to be undertaken within the next year.²³⁶ The Director of OMB is authorized to review the draft program for consistency with administration policy.²³⁷ After the reviewing process is complete, the agency must file a final regulatory plan. This plan is used to develop an Administration Regulatory Program that will be published in the *Federal Register*.²³⁸ The Order also provides that if the agency head proposes to take a significant regulatory action not included in or materially different from the final regulatory plan, she must submit the action to the OMB for review.²³⁹ This same concept could be utilized by the Minnesota Legislature by requiring an annual regulatory program to be submitted to the standing committees and the LCRAR. The regulatory planning requirement could be limited to anticipated major changes in policy to be effectuated through rulemaking or adjudication.

The development of an agency regulatory plan should have the same effect on regulatory decisions that the development of a budget request has on fiscal planning. The plan will provide an annual opportunity for the agency head to focus on the work of her agency in a planning rather than a reactive mode, stressing broad vision and priority setting. This should tend to ensure that the agency heads, rather than staff, make regulatory policy decisions.²⁴⁰

Legislative access to an annual regulatory program will also provide a means for the legislature to police agencies' adoption of policies significantly affecting the public through informal policy statements and adjudication rather than through rulemaking subject to the Administrative Procedure Act. A "significant regulatory action" to be reported in the annual program should be defined to include not just contemplated rules, but also any agency action of unusual or significant public interest, any agency action likely to establish an important new policy or legal precedent, or any agency action designated by the LCRAR to warrant review as a significant regulatory ac-

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. See A.B.A. REPORT., *supra* note 180, at 8.

tion. If the legislature were to adopt section 3-204 of the Model State APA, the LCRAR would have the power to direct the agency to go through a rulemaking proceeding when it determined that such a proceeding is necessary.²⁴¹

One of the most difficult, but most important questions in administrative law is how to provide notice of new policy or important changes in agency policy to affected persons without incurring high costs. The publication of an annual regulatory program will provide in one accessible document notice of the intended direction and the requisite time to influence legislators and the executive on the political dimensions of the contemplated policies.

D. Informal Policy Statements

The legislature must keep in mind that as Congress and the President have sought to control rulemaking, the balloon of bureaucratic arbitrariness has emerged elsewhere. Certain federal agencies have moved toward informal policy statements and are making policy through application of informal policy statements in adjudication.²⁴²

Rulemaking provides for wide notice and the opportunity for *all* interested parties to help create the body of evidence on which the regulatory decision will be based. It is also prospective in its scope and remedies so that the public is given fair warning that the law is changing. In adjudication, the agency makes an administrative determination which involves only the named parties and focuses on their individual facts. While other materially and adversely affected parties may be able to intervene, they can do so only if they learn of the adjudication. Decisions made in an adjudicatory setting do not provide as much opportunity for complicated technical comments or input from the general public. Adjudication is also retrospective, since a person may be penalized for conduct which may not have been clearly unlawful.²⁴³ The target of an adjudication may also find its reputation badly damaged if it contests a specific charge. This creates great pressure to settle a matter

241. See MODEL STATE APA, *supra* note 89, § 3-204.

242. Scanlon & Rogowsky, *Back-Door Rulemaking: A View from the CPSC*, REGULATION 27 (July-August, 1984). Federal agencies "are accomplishing more of their policy goals through the case-by-case proceedings in which they grant licenses, or otherwise apply the law to individual parties." *Id.*

243. *Id.* at 29.

rather than to litigate it. In rulemaking, the issues may be fully explored without adverse publicity.²⁴⁴ Finally, ad hoc agency precedent established by adjudication is not easily accessible or understood by the public, the legislature or the governor. As a result, accountability of the agency is diminished.²⁴⁵

Agencies may prefer to avoid rulemaking because it is expensive and time consuming. Policy statements also allow both wide latitude to an agency to adopt policies of its choosing without the constraint of public input and greater flexibility if an agency decides to modify its policy without an APA proceeding of any type.²⁴⁶

The adoption of new policies through the combination of informal policy statements or guidelines and their application in adjudicatory proceedings may be more common at the federal level than in Minnesota.²⁴⁷ The continuing efforts by agencies in Minnesota to adopt policy statements and guidelines without recourse to APA rulemaking suggests that there is a problem with the adoption of informal policy statements and their application in adjudication in the state.²⁴⁸ Minnesota courts have regularly held that policy statements or guidelines which either (1) involve matters of obvious public concern or (2) result in the implementation of a policy which is in conflict to some degree with a promulgated rule or statute have no force and effect of law.²⁴⁹ In the large majority of these cases, the Minnesota courts also give no deference to the agency's policy statement or guideline.²⁵⁰ In many of these decisions,

244. *See id.*

245. *See id.*

246. *See id.* at 30. The flexibility of "adjudicative rulemaking" from the agency's standpoint can create considerable uncertainty about the state of the law. Agencies have considerable latitude to disregard their prior adjudicative decisions whereas it is unlawful to depart from regulations. *Id.*; *see also* Bonfield, *supra* note 226, at 98.

247. *See* Beck, *State Agency Policymaking: Mere Interpretation or Illegal Rulemaking?*, 54 THE HENNEPIN LAWYER 10, 10-11 (July-Aug. 1985).

248. *Id.* at 10.

249. *See id.*

250. *Id.* at 11, 23-24. Commentators stress that agencies should guide staff in the exercise of discretion, and that the public benefits from knowledge of how that power will be utilized. Professor Asimow notes that agencies have fixed budgets and many competing uses for available resources. Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 387-88. It presently takes from 6 to 12 months for a federal agency to push an uncontroversial rule through notice and comment procedures, and longer if the rule is controversial. Agencies will make fewer interpretive rules or policy statements if they must incur the costs of notice and comment procedures to promulgate them. The agency staff can still adjudicate and use informal

the Minnesota courts have also directed the agency not to continue executing a policy until the rulemaking process of the APA has been followed.²⁵¹

While codification of this line of cases is possible, this step seems unnecessary since Minnesota courts are forcing agencies using informal guidelines and policies to comply with rulemaking procedures in appropriate cases.²⁵² The issue for the legislature is one of notice of significant policies which are presently incorporated in informal guidelines and implemented through ad hoc adjudication which may not be easily understood and reviewed by legislators. The announcement of all significant regulatory actions contemplated in the regulatory program should assist legislative oversight of these agency policies.

There is still a problem in terms of notice and opportunity to participate for adversely affected parties when an agency does not issue even any informal guidelines or policy statements to the public, but seeks to create new policy through adjudication.²⁵³ It would be useful if the agency would give wide notice of proposed new policies and policy changes in adjudicatory proceedings to encourage intervention on the policy issue.²⁵⁴

memoranda, hallway conversations, or other informal communications to guide their discretion. The costs of uncertainty created by the absence of interpretive rules will be borne by the public. *Id.* at 404-05. Professor Asimow concludes that while it is a close question, he believes the public loses more than it gains by forcing interpretive rules and policy statements through notice and comment rulemaking. The Minnesota Legislature and Minnesota courts disagree with this conclusion.

251. Beck, *supra* note 247, at 23-24.

252. *See id.*

253. The suggestion made by Mr. Harves, the Chief Administrative Law Judge (ALJ) of Minnesota, that the APA be amended to specifically prohibit agencies "from the issuance of any bulletins, guidelines, directives or other interpretive statements which are intended to be of general applicability and future or retroactive effect, made to implement" law or policy seems futile at best and possibly counterproductive. The APA already implicitly prohibits the agencies from this very thing by defining such agency actions as rules and saying that rules can only be promulgated following the rulemaking procedures of the Act. Further, as the text notes, the courts have vigorously reinforced this existing directive. The policy that binding rules by whatever name can be the product only of a rulemaking proceeding could hardly be more clear. On the other hand, discouraging agencies from revealing informal policies will not prevent the agencies from making and implementing those policies but may encourage them to hide the fact that they are doing so. It is better to encourage the agencies to make their policy choices explicit and to have available the tools needed to force them where necessary to develop those policy choices in a well-informed environment.

254. *See* Levinson, *Comments on Administrative Law*, 3 AD. L. NEWS 2, 3-4 (1985). In

E. Economic Impact Analysis

The second objective of legislative oversight that the control mechanism should seek to ensure that the agency engages in reasoned decision making. This goal is achieved by the Minnesota Administrative Procedure Act (MAPA).²⁵⁵ Reasoned agency decision making is encouraged by requiring agencies to comply with procedural requirements of this act under the supervision of the Office of Administrative Hearings and the judiciary. The reasoned decision-making objective could be strengthened by adding to MAPA, a regulatory impact provision similar to section 3-105 in the 1981 Model State APA.²⁵⁶ An agency would be required to issue a regulatory analysis of a proposed rule if a request for the analysis is filed by the governor, or the LCRAR. Because the preparation of such an analysis can be very burdensome, and could be subject to abuse as a delay tactic, the sounder approach is to limit its issuance only upon demand by the governor or the LCRAR members who are directly elected state officials. The Model State APA suggestion that an impact statement could also be required upon the request of any agency, political subdivision, or 300 signatures is not recommended.

Regulatory decisions should be based on a detailed inquiry into the advantages and disadvantages of a proposed course of action and on consideration of less intrusive alternatives to that course of action.²⁵⁷ An impact analysis forces the agency to consider thoroughly the advantages and disadvantages of a

Florida, a line of cases has developed in response to an innovative state APA holding that while rulemaking is usually the better route when developing new policy, due to the notice and publication requirements in rulemaking, it is not mandatory. An agency may develop new policies via adjudication if it follows certain procedures. The agency staff must make the proposed "incipient" policy an issue in the adjudicatory proceeding at the ALJ level. The other parties and any intervenors in the case, therefore, have the right to rebut and counter. The purpose of this framework is to open up the adjudication to a flow of public opinion comparable to that which would be available in rulemaking. The arguments will go up to the agency head as part of the record, at which time the deference owed by the agency head to the ALJ comes into play. See *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So.2d 1177 (Fla. Dist. Ct. App. 1981); *Application of Portland Gen. Elec. Co. (Marbet v. Portland Gen. Elect. Co.)*, 561 P.2d 154 (Ore. 1977).

255. See MINN. STAT. §§ 14.01-.70 (1984).

256. MODEL STATE APA, *supra* note 89, § 3-105.

257. Advantages and disadvantages are used rather than costs and benefits since the latter implies the controversial criterion of willingness to pay. See 1985 A.B.A. REPORT, *supra* note 183, at 6.

proposed rule.²⁵⁸ It should assist a decisionmaker to be certain that a decision is consistent with her own objectives. It will also expose the decisionmakers' objectives to the scrutiny of the public. The more explicit a policy maker is forced to be in justifying decisions, the more difficult it is for the policy maker to act against the wishes of the people to whom she is accountable. If decisions are made in an ad hoc manner, justified only by unspecified reasons, it is relatively easy for the decisionmaker to pursue objectives that would not command support if they were stated openly.

Even if the decisionmaker might not prefer an impact analysis, the public would benefit by more explicit articulation of objectives and advantages and disadvantages of alternative courses of action. As under the provisions of section 3-105, the analysis should contain: (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule; (2) a description of the probable quantitative and qualitative impacts of the proposed rule, economic, or otherwise upon affected classes of persons; (3) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; (4) a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction; (5) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; (6) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule. Since it is the LCRAR which could trigger this requirement, it would add an additional tool to the control mechanisms exercised by the LCRAR.

Some state APA's provide for an impact analysis.²⁵⁹ The Minnesota APA currently provides for a modified impact analysis. In 1983, the Minnesota Legislature added section 14.115,²⁶⁰ which requires special consideration of small busi-

258. R. SUGDEN & A. WILLIAMS, *THE PRINCIPLES OF PRACTICAL COST BENEFIT ANALYSIS* 236-41 (1978). *But see* Sunstein, *Is Cost Benefit Analysis a Panacea for Administrative Law?*, 29 CHI. L. SCH. REC. 19 (Spring 1985).

259. *See, e.g.*, ILL. REV. STAT. ch. 127 § 1007.04 (1981).

260. MINN. STAT. § 14.115 (1984). The statute requires that: (1) special efforts by

ness needs in rulemaking. Presumably this legislation was enacted because small businesses cannot experience the economies of scale of larger businesses in dealing with regulatory costs. A legitimate concern is that when a rule will have a significant impact on society, the legislature should make such an analysis generally available and not limit it to small business concerns. Agencies should also focus on the impacts of rules on other groups, many of whom have fewer resources than small businesses.

As far as the authors can determine, there has been little quantitative study of the effectiveness of section 14.115. Section 14.115 has two principal requirements. The first is an outreach requirement that the agency provide an opportunity for small businesses to participate in the rulemaking process.²⁶¹ Anecdotal evidence indicates that agencies are using associations of small businesses to provide notice of rulemaking in association newsletters and bulletins of agency rules affecting small business. The principal problem noted is one of timeliness of notices effectuated in this fashion. Association newsletters and bulletins are published, at most, monthly and the notice may get to membership with very little time left to prepare any meaningful response.

Section 14.115 is modeled after a similar piece of federal legislation, the Regulatory Flexibility Act.²⁶² The Small Business Administration reported in 1984 that compliance with the

an agency to provide an opportunity for small businesses to participate in rulemaking; (2) consideration by the agency of alternatives to reduce the impact of the rule on small businesses and adoption of those alternatives the agency finds to be feasible unless contrary to statutory objectives; and (3) in the statement of need and reasonableness, documentation by the agency that it has considered these methods and the results. *Id.*

261. *Id.*, subd. 4. The agencies utilize *one or more* of several listed methods including (1) a description in the notice of proposed rulemaking of the probable impact of the rule on small businesses, (2) the publication of the notice of proposed rulemaking in publications likely to be obtained by affected businesses, (3) the direct notification of small businesses that may be affected, and (4) the conduct of public hearings concerning the impact of the rule on small businesses. *Id.*

The LCRAR's 1983-84 Biennial Report contains a brief discussion of implementation of section 14.115 requirements. It says no complaints have been received from the public or legislators and "research into the files of the Attorney General's Office" reveals three cases of that office's disapproval of proposed agency rules where the agency had not complied with § 14.115. As the succeeding textual discussion implies, the authors believe there may be more of a compliance problem than the formal record examined by LCRAR reveals.

262. 5 U.S.C. § 602(a).

outreach requirement varied greatly. Top level officials in many agencies did not know what was being done to facilitate participation by small businesses in rulemaking, and many agencies were quite passive in their approach, using trade associations to monitor regulatory developments and to report on them to their members. Other agencies were far more active in compliance and made special efforts to bring small businesses into the process through, for example, the development of carefully targeted mailing lists and the provision of information on how to comment.²⁶³ Limited anecdotal evidence indicates that there may also be substantial variation among Minnesota agencies in the vigorousness of their outreach to small businesses. This evidence warrants further inquiry.

The second principal requirement of section 14.115 is that an agency consider alternatives to reduce the impact of a rule on small businesses and adopt those less restrictive alternatives the agency finds to be feasible unless contrary to statutory objectives. The agency must document in the statement of need and reasonableness that it has considered these methods and the results. There are some indications that agencies are being forced to examine rules for their impact on small businesses because administrative law judges are requiring these considerations to appear in the statement of need and reasonableness. There have been several adverse findings by administrative law judges when agencies have failed to include this assessment in the statement of need and reasonableness. Failure to include these assessments in the statement is a minimal standard of performance of section 14.115 requirements. Without a random sample and analysis of a number of these statements of need and reasonableness, it is not possible to assess the quality of these agency analyses of impact on small businesses and feasible alternatives. Agencies may not know what must be included in the statement of need and reasonableness to demonstrate compliance, and it would be useful for the Office of Administrative Hearings to develop more specific requirements for these assessments.

Section 14.115 does not require a full regulatory impact analysis.²⁶⁴ Its focus is the impact of rules on small businesses

263. Goldberg, *Agency Compliance with the Outreach Requirements of the Regulatory Flexibility Act*, 9 AD. L. NEWS 3, 7 (Spring 1984).

264. MINN. STAT. § 14.115.

and the adoption of less restrictive alternatives where feasible. In contrast, section 3-105 requires both a thorough assessment of the *advantages* and disadvantages of a proposed rule to *all persons who probably will be affected* by a rule, and a consideration of less intrusive alternatives for achieving the purpose of the rule.²⁶⁵

The statement of need and reasonableness required by section 14.131 of the Minnesota Administrative Procedure Act and the requirement under section 14.14 that the agency shall at the hearing make an affirmative presentation of the facts establishing the need for and reasonableness of the proposed rule do not require a thorough assessment of all advantages and disadvantages of a proposed rule. Rule 1400.0500 of the Office of Administrative Hearings requires that "the statement of need and reasonableness must contain a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying the need for and the reasonableness of the proposed rules. . . ." ²⁶⁶ Rule 1400.0800 provides that at the hearing "the agency shall make its affirmative presentation of facts showing the need for and the reasonableness of the proposed rules. . . ." ²⁶⁷

The rules of the Office of Administrative Hearings do not further define the terms "need for" and "reasonableness of." It appears that administrative law judges are requiring facts in the record indicating that there is a problem, that the rule proposed is needed to address that problem, and the rule does so in a rational manner. This is essentially a rational basis review based on the whole record similar to a judge's review of a rule using an arbitrary and capricious scope of review. It is a deferential scope of review. The issue is not whether the administrative law judge would come to the agency's decision given the whole record, but whether there is a rational basis in the record to do so. The statement of need and reasonableness and the burden on agencies to demonstrate affirmatively the need for and reasonableness of the proposed rules thus ensures only that the agency has thought through its objectives and has a reasonable basis for them, not that the agency has

265. Compare MODEL STATE APA, *supra* note 89, § 3-105 with MINN. STAT. § 14.115.

266. 1 MINN. CODE AGENCY R. § 1400.0500 (1985).

267. *Id.* § 14.0800.

documented and considered *all* advantages and disadvantages of a proposed rule.

Section 14.11 of the Minnesota Administrative Procedure Act requires that when a rule will require the expenditure of public funds by local public bodies, the agency must include in the notice of rulemaking a “reasonable” estimate of the total cost to implement the rule for the two years immediately following adoption of the rule. This notice must be provided when the estimated total cost exceeds \$100,000 in either of the two years. This provision requires agencies to estimate cost impact of rules on local public bodies. Presumably, the requirement increases agency awareness of these costs. As long as agencies make some estimate of these costs, it is very difficult for administrative law judges to review the adequacy of the estimate because of the “reasonable” language in section 14.11. The section 14.11 requirement is clearly not a requirement of any full assessment of advantages and disadvantages to *all* affected parties.²⁶⁸

In sum, the effects of these requirements may vary from case to case and agency to agency, but none of them are designed to provide a comprehensive agency analysis of both the advantages and disadvantages to all affected parties of any particular proposed rulemaking. Only section 14.115 requires the con-

268. See MINN. STAT. § 14.115, subd. 2 (1984). During the 1985 session, the Minnesota Legislature added another somewhat similar requirement by amending section 14.131 to require agencies prior to notice of rulemaking to make available for public review both the statement of the need for and reasonableness of the rule and a fiscal note if required by section 3.982. Under the redundant provisions of section 3.982, when the state imposes a requirement (including penalties for noncompliance) that local government take an action and when reasonable compliance with that action would force local governments to incur increased costs as a result of an order or rule of the executive branch, a fiscal note shall be prepared and made available to the public upon request. Under section 3.98, a fiscal note “where possible, shall: (1) cite the effect in dollar amounts; (2) cite the statutory provisions affected; (3) estimate the increase or decrease in revenues or expenditures; (4) includes the costs which may be absorbed without additional funds; and (5) specify the long range implication if any.” MINN. STAT. § 3.98 (1984).

Administrative Law Judges will require that the statement of the need for and reasonableness of rules include this assessment when any rule or order of the executive branch will increase costs to local governments. As with the reasonable estimate of costs required by section 14.11, the preparation of a fiscal note will make agencies aware of costs imposed on local governments by their actions. The analysis required in a fiscal note, however, does not include a full assessment of the advantages and disadvantages of a proposed rule to all affected parties. The analysis does not require agencies to consider other regulatory alternatives and the adoption of the least costly alternative when feasible.

sideration of alternatives and the adoption of less restrictive alternatives where feasible. Section 3-105 similarly requires an analysis of less intrusive alternatives and an explanation of the reasons why these were not adopted.

One issue that arises with respect to cost benefit or regulatory impact analyses is the scope of judicial review of such agency analyses. At the federal level, Executive Order 12,291 requires affected agencies to take regulatory action "only when the potential benefits to society for the regulation outweigh the potential cost to society." In many instances, the federal courts have limited or precluded an agency's consideration of costs in its decisionmaking. The court's decisions are based on an authorizing statute which either precludes cost as a factor, or allows only limited consideration.²⁶⁹ The cost consideration requirement of the executive order cannot alter the statutory directive to the agency.

Under the Model State APA, section 3-105(f) provides that if the agency makes a "good faith effort" in performing a regulatory impact analysis, "the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate."²⁷⁰ In other words, the analysis is not a substantive requirement that calls for the agency, for example, always to choose the most cost effective regulation. The legislature may feel that factors other than cost are of overriding importance in some areas of regulation such as health and environment. It is instead a procedural requirement much like an environmental impact statement designed to better inform the agency about the cost ramifications of its regulatory choices. This is a sensible approach achieving the informational benefits of cost benefit analysis without imposing a blanket cost consideration factor in all rulemaking decisions. This approach is recommended for Minnesota.

With judicial review language similar to that in section 3-

269. See, e.g., *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 55 (1983) (concluding that while some consideration could be given to cost, "Congress intended safety to be the preeminent factor" in the agency's rulemaking); *American Textile Mfg. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (Court concluded that OSHA required agency to set workplace exposure standards that were technologically feasible but costs could not be balanced against health protection considerations). See generally, Silverglade, *Judicial Control of Regulatory Action Based on Cost-Benefit Analysis*, 36 AD. L. REV. 387 (1984).

270. MODEL STATE APA, *supra* note 89, § 3-105(f).

105(f) of the Model State APA, a Minnesota court reviewing an agency's rulemaking efforts would look to see whether the agency completed a regulatory impact analysis as part of its decision-making on the rule. If the record showed the agency exerted a good faith effort, the agency decision is upheld.²⁷¹

Under Minnesota's small business considerations requirement in section 14.115 of the APA, either an administrative law judge or the attorney general may find that an agency has failed to comply with the requirements of that section in a rulemaking proceeding. If the agency fails to comply "the rules shall not be adopted." This is not a review power, but amounts instead to joint decision-making power among the administrative law judge, attorney general, and the agency as to whether the small business considerations enumerated in this section of the act have been made. This joint decision is not recommended for regulatory impact analysis in Minnesota. Judicial review of the scope discussed above is a better approach.

The last objective of legislative control is to address the problem of the lack of overall coordination among the agencies. Each agency may pursue its mission properly and diligently, but when all agency regulation is taken together, its total impact may be extremely burdensome and uncoordinated. There has been no equivalent to the budgeting process on the fiscal side to coordinate all regulation by agencies. It is common knowledge that regulated entities in the state have finite resources with which to deal with regulatory requirements at any one time. The imposition of many uncoordinated regulatory requirements may demand such significant resources that the state's economic health would be jeopardized.

There is no simple solution to this problem. The legislature and the governor should look closely at the recent federal efforts to achieve this objective of better coordination among the agencies. In August of 1985, the OMB published the first an-

271. *See id.* Of course, whether and to what extent the agency may consider cost as a substantive factor in its rulemaking decision will depend upon the statute under which the rule is being made. As with any other substantive factor for administrative decision making, a reviewing court can analyze whether the agency used the factors the legislature intended for the agency to consider in its decision making. The section 3-105 language, however, is not a legislative directive to make cost a decision making factor. It is a procedural requirement which, when satisfied, informs the agency about the cost factor so that it *may* consider that factor to the extent its substantive rulemaking statute allows. *See* MODEL STATE APA, *supra* note 89, § 3-105.

nual report outlining the federal regulatory initiatives of 17 executive branch agencies.²⁷²

This type of overall compilation of planned regulatory initiatives would, at least, provide a basis for the LCRAR, the legislative leadership, and the standing committees to understand and better coordinate the entire regulatory program. This information about anticipated agency regulatory initiatives is useful in and of itself. Implementation of the planning process will also lay the foundation for later consideration by the legislature of the regulatory budget concept discussed in Section IV.

VI. RESOURCES FOR IMPLEMENTATION

All of these recommendations assume sufficient staff capability at the LCRAR to undertake increased oversight responsibility. The current LCRAR mission is principally to respond to complaints. In order for the LCRAR to carry out an active review of all proposed and existing rules, it must have adequate staff capability. Any LCRAR oversight without technically trained staff must defer more to agencies and the effectiveness of review will be impaired. Existing rules should also be reviewed, since many of them were promulgated years ago and have not been subject to close legislative scrutiny. The review of all existing rules could be phased in over several years to economize on staff needs. As of 1985, the Minnesota LCRAR had a staff commitment of two and three-quarters full time equivalents with legal assistance as needed.²⁷³ This was the median number of staff in the states with a legislative rules review capability.²⁷⁴

Serious consideration should be given to increasing this commitment. Those states most active in regulatory oversight, such as Florida and Illinois, have made committee staff commitments of thirteen to twenty-six full time equivalents. The regulatory agenda concept in particular would require a substantial commitment of resources to create the necessary capability to administer the proposal. The level of staff will depend on the breadth of the oversight mission the legislature wishes the LCRAR to undertake.

272. Exec. Order No. 12,498, 1985 U.S. CODE CONG. & AD. NEWS at B15.

273. See Letter from Maryanne Hruby, *supra* note 59.

274. See *Legislative Review Update*, *supra* note 129, at 11-12.

The legislature should also consider institutional arrangements to fulfill its obligation and the obligation of regulators to be informed on the best current thinking available on regulatory issues. Educational programming during the interim focusing on regulatory issues of importance to the state will help to provide principled analysis of policy options before issues are of such urgency that there is little opportunity for exchange of information.

The authors believe adoption by the Minnesota Legislature of some or all of these recommendations can significantly improve the legislature's capacity to oversee administrative agency exercise of power.

